IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Petitioner

Adams Press Corp., 130 Cedar Street, N. Y. 10006—(212) 233-1050

TABLE OF CONTENTS OF PETITION

TABLE OF CONTENTS OF THE APPENDIX

TABLE OF CASES AND AUTHORITIES

Other Authorities:

Constitution:

Federal Statutes and Rules:

State Statutes:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

ARTHUR F. TURCO, JR.

Petitioner,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Arthur F. Turco, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Western District of New York dismissing petitioner's Amended Complaint.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is set forth in the Appendix hereto at 3a. It has not yet been reported. The District Court opinion is set forth in the Appendix at 18a. It is unreported.

For the convenience of the Court, we have set forth in the Appendix the related opinions in the State courts. The opinion of the Appellate Division of the Supreme Court of New York dated December 17, 1973, is set forth in the Appendix at 35a. It is unreported. The opinion of the Appellate Division of the Supreme Court of New York dated January 28, 1975, is printed at 46 A.D. 2d 490 (4th Dept.) and is set forth in the Appendix at 39a. The order of the Court of

Appeals of the State of New York is printed at 36 N.Y. 2d 713 (1975) and is set forth in the Appendix at 64a.

JURISDICTION

The United States Court of Appeals rendered its decision on April 21, 1977. On May 23, 1977, that Court granted a motion to stay the issuance of its mandate pending application to this Court for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a litigant who is involuntarily brought before a state court in a punitive proceeding and makes substantial and non-frivolous claims before the state court that the procedures employed there violate litigant's federal constitutional rights and presses those claims to the end of all available appellate procedures within the state judicial system and petitions

this Court for a writ of certiorari, which was denied is barred by principles of res judicata from presenting his constitutional claims to a United States District Court after the completion of the state court proceedings?

2. Whether this Court should resolve a direct conflict between the Second Circuit and the Sixth Circuit on the foregoing question?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States;

2. New York Judiciary Law, Sec. 90, paras. 2 and 4.

These are set forth in the Appendix at 1a-2a.

STATEMENT OF THE CASE

After seven years of practice of law, Arthur F. Turco., Jr., the petitioner herein, was disbarred by an order of the

Appellate Division of the Supreme Court of New York.[1/] The United States Court of Appeals for the Second Circuit affirmed an order of the United States District Court for the Western District of New York, dismissing an Amended Complaint filed by him wherein he sought to enjoin his disbarment. The thrust of his claim in the District Court action was that the Appellate Division violated his constitutional rights in the procedures which resulted in the order of disbarment. He asserted jurisdiction in the District Court under 42 U.S.C. Sec. 1981, et seq.

The case was decided by the District Court upon an Amended Complaint, a motion for temporary injunctive relief, and a cross-motion for dismissal. In this posture, there were no contested issues of fact and the allegations of the Amended Complaint are

---

1/ Matter of Turco, 46 A.D. 2d 490 (4th Dept.), appeal dismissed 36 N.Y. 2d 713, cert. denied 423 U.S. 838 (1975).

taken as true and are undisputed. Briefly stated, the facts are:

Mr. Turco was admitted to the New York Bar on December 21, 1967, in the First Department. He practiced law in the metropolitan area and its environs for several years and in August, 1971, moved to Rochester, where he was employed as an attorney. On May 8, 1973, in a petition filed in the Appellate Division for the Fourth Department of New York, and seeking relief by way of discipline, Mr. Turco was charged with having entered a plea of "common law assault" (a misdemeanor) for which he received a five-year suspended sentence in February, 1972, in Maryland. The foregoing petition noted that a wide range of charges against Mr. Turco, which went as far as conspiracy to murder, had been withdrawn by the Maryland authorities. The disciplinary petition also charged that the following month Mr. Turco entered a plea of guilty in a New York court to the misdemeanor of unlawful possession

of a weapon, (an offense for which he was conditionally discharged). As in the case in Maryland, the foregoing petition noted that Mr. Turco was charged with other offenses in New York, but that those charges were withdrawn by the New York authorities. Attached to the pleading was an assortment of underlying documents including transcripts of the court proceedings from both Maryland and New York. The disciplinary petition specifically did not allege that Petitioner Turco was guilty of any of the conduct attributed to him in any of the indictments which were withdrawn (e.g., conspiracy to murder in Maryland, or possession of drugs in New York) when he entered his misdemeanor pleas. Nor did the disciplinary petition assert the truth of various unsupported statements made by the prosecutor in the Maryland proceedings at the time Mr. Turco's plea was accepted. Those statements were in the transcripts attached to the disciplinary petition.

In response to that petition, as summarized by the Court of Appeals, "He [Mr. Turco] moved for the dismissal of the charges against him and, in the alternative, asked for a full evidentiary hearing to determine whether he was guilty of the offenses to which he had pleaded guilty. This request was based on his assertion that he had entered the guilty pleas under North Carolina v. Alford, 400 U.S. 25 (1970) (see infra), and that, accordingly, he had a right to prove that he was, in fact, not guilty of the charges to which he had pleaded guilty." (Opinion of the Court of Appeals, 7a-8a.)

On these papers alone, and without a hearing, the Appellate Division, in a decision dated December 17, 1973 (35a), concluded that Mr. Turco's guilty pleas to two misdemeanors established that he was "guilty of professional misconduct in his office as an attorney and counselor at law" and "should be disciplined."

It should be noted that under the New York disciplinary statute, a lawyer's conviction of a felony automatically results in disbarment (2a), but conviction of one or more misdemeanors may or may not result in disciplinary action in which punishment could range from a letter of censure to disbarment (ibid). The matter is left to case-by-case determination, in which the conviction and its underlying facts are but one element. Matter of Kimball, 33 N.Y. 2d 586, 347 N.Y.S. 2d 453 (1973); In re Keogh, 25 App. Div. 2d 499, 267 N.Y.S. 2d 87, modified on other grounds, 17 N.Y. 2d 429, 266 N.Y.S. 2d 985, 214 N.E. 2d 163 (1966).

In this case, the Appellate Division's decision of December 17, 1973,includes no explanation of its finding of "professional misconduct." On the record before it, the only undisputed facts were the convictions themselves. All other aspects which were critical to the individualized determination called for by the New York statute, e.g.,

whether petitioner was in fact guilty, why he entered the pleas, the factual background of the alleged crime, and how, if at all, the pleas of guilty established professional misconduct, were placed at issue and petitioner had expressly sought and been denied a hearing on those matters.

On the question of whether petitioner would be permitted to prove his innocence, the Appellate Division said:

> "In his answer respondent admits the convictions but seeks to prove that in fact he was not guilty of the charges to which he plead guilty...We...conclude that North Carolina v. Alford, (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead." (37a)

The Appellate Division, having found petitioner "guilty", did grant petitioner leave to request a hearing on the question of "mitigation" of punishment and decided that such hearing be had before a referee with power to report but not to recommend. The mitigation hearing developed extensive proof of petitioner's good character through

the testimony of an unusual array of witnesses (including judges, prosecutors, colleagues at the Bar, Bar Association officers, etc.),[2/] but by reason of the decision of the Appellate Division foreclosing the same, petitioner was not permitted to call witnesses to prove his innocence though he personally testified and asserted that h

---

2/ The hearing included a probably unprecedented outpouring of support for a lawyer. There were 48 witnesses testifying on behalf of Mr. Turco, including a sitting United States District Judge, four sitting Justices of the Supreme Court of New York, two sitting Rochester City Court Judges, three sitting Justices of the Peace, a former Attorney General of the United States, four lawyers who were either then or had been trustees of the Monroe County Bar Association, the District Attorney of Cayuga County, the First Assistant District Attorney of Monroe County, the Bishop of the Episcopal Diocese of Rochester, and numerous other prominent lawyers and citizens of the community, all testifying to the extraordinary reputation for integrity and competence which Mr. Turco had earned.

was innocent of the specific charges to which he pleaded guilty. As the Amended Complaint points out, during the mitigation hearing there was no evidence whatsoever produced concerning petitioner's guilt of the two misdemeanors, nor was there any evidence concerning anything negative about petitioner's character. While the issues before this Court obviously do not concern the merits of petitioner's defenses, nevertheless, it may be appropriate to call the following matters to the attention of this Court as indicative at least of the bona fides of petitioner's demand for a hearing in an effort to establish his innocence and the importance from the point of view of Due Process of the failure to accord him a hearing.

From petitioner's testimony at the mitigation hearing and the summary in his Answer, the following emerged as his explanation of the circumstances:

> The proceedings in Maryland arose out of a complex indictment which charged petitioner and other(s) with

> grave offenses, including conspiracy to commit murder, all arising out of a series of events involving the Black Panther Party, which petitioner had been representing.
>
> Petitioner was brought to trial but only after he had been held without bail for 10 months, most of which were spent in solitary confinement, which had a devastating impact upon his health. The jury disagreed. Petitioner, who had been functioning as an attorney on behalf of the Black Panthers and who was the only white person among the defendants, alone was set for retrial by the prosecutor, all of his co-defendants having been acquitted or having had their cases dismissed at the request of the prosecutor. 3/
>
> When he was called for retrial, petitioner was given the choice of proceeding as the sole defendant on a charge of conspiracy to commit murder, assault with intent to murder, soliciting to commit kidnapping, and common law assault, or accepting a plea to a misdemeanor of assault with a commitment by the prosecutor that there would be a recommendation of no custodial sentence.

3/ The Circuit Court opinion refers to the fact that one defendant whose trial had been severed was convicted. That trial and conviction occurred before Mr. Turco was first brought to trial. It is of interest that even that defendant, who had been sentenced to life imprisonment, had his sentence commuted to time served on October 15, 1974.

Petitioner, with a vigorous insistence of innocence of all charges made through his counsel on the record, opted for one plea of this minor charge, in the face of massive pretrial publicity and hysteria in the community which had been generated against him; legitimate fear for the safety of his family as a result of hate-group threats and intimidation from unidentified persons; repeated threats of bail revocation; a seriously ill wife; lack of funds to pay and retain local counsel; and the prosecutor's making it clear that if he did not plead to the minor misdemeanor charge, trial would be pressed on each of the foregoing grave charges involving aspects of murder. 4/

But even this extraordinary choice, made with an assertion of innocence, was not resolved in petitioner's mind until his counsel had first ascertained from the Bar Association of the City of New York that a plea to a misdemeanor would not result in automatic disbarment and that petitioner would have an

---

4/ Mr. Turco's claim of innocence with respect to the Maryland charges was based upon a solid alibi supported by the proferred testimony of at least eight individuals, most of whom plainly had no interest in the matter and whose testimony was buttressed by documentary evidence. By contrast, the testimony which the state said it would present repeated a story told at the first trial by the main prosecution witness, whose testimony the trial judge found so inconsistent with documented facts that after cross-examination he struck completely all of his testimony as being incredible.

opportunity to explain the circumstances of his plea to a referee in the State of New York and to establish his innocence.

A similar situation obtained in New York, where Mr. Turco had been charged with possession of dangerous weapons, dangerous drugs, and hypodermic instruments. 5/ A guilty plea was entered to the misdemeanor of possession of a dangerous weapon, with an assertion of innocence, the plea being offered under the Supreme Court's decision in North Carolina v. Alford, 400 U.S. 25 (1970).

5/ The Appellate Division stated petitioner was also charged with obstructing the government administration. That is not so.

To put the New York charges in perspective, it should be noted that the hypodermic instruments and accompanying insulin were demonstrably for petitioner's diabetic condition and in pretrial proceedings their use as evidence was suppressed -- a fact completely ignored by the Appellate Division. The dangerous drugs (marijuana) and dangerous weapons were not shown to be owned by Mr. Turco and he was charged solely because those items were found in an apartment in which he was temporarily staying. Beyond that, they were found in the owner's bedroom, which was occupied by Mr. Turco, yet the owner was not charged!

Indeed, a total of ten defendants were charged with criminal offenses out of this episode and all charges against defendants other than Mr. Turco were dismissed.

The referee's report without recommendation was filed on October 25, 1974. On January 28, 1975, the Appellate Division rendered its decision disbarring petitioner (39a). As pointed out in petitioner's Amended Complaint, the decision of the Appellate Division, disbarring petitioner, contains an extended statement based upon allegations which the petitioner by the Appellate Division order was precluded from refuting. Those unproved allegations are alleged in the Amended Complaint to be totally false (28a).

As alleged in the Amended Complaint, the Appellate Division, by its order of December 17, 1973, did not allow petitioner to go behind the two convictions to prove his innocence; however, by its decision, the Appellate Division went far behind that order and turned mere allegations of which the petitioner had not even been charged into findings of fact.

All this came about because the Appellate Division rested its decision upon

statements by the Maryland prosecutor of expected testimony of government witnesses upon charges which the prosecutor withdrew at the time the guilty plea to the misdemeanor charge was accepted. While petitioner stipulated to the fact that the Government witnesses would so testify on direct, he never stipulated to the truth of what they would say. In fact, on the record Mr. Turco's counsel set forth what would be established to contradict what the state witnesses would say. Based upon the conflict, the Maryland Court accepted a plea to the misdemeanor. Substantially the same sequence occurred in New York. Before the Appellate Division, however, this became proof of guilt of charges that were withdrawn in Maryland and in New York (45a et seq.). It was these unproved allegations -- accepted by the Appellate Division as true, which formed the basis for its disbarment order -- for its determination that although the record showed only a conviction of minor misdemeanors -- the conduct

of the petitioner was of such seriousness as to merit disbarment. In other words, the content or scope of the misdemeanors (which on their face were merely a simple assault and a weapons possession charge) were enlarged upon by unproved proffers of proof and charges which had been withdrawn.

Thus, the structure of the entire proceeding before the Appellate Division, as alleged in the Amended Complaint and not disputed, was such that petitioner a) was not charged with or given notice that he was charged with having committed the acts attributed to him by prosecuting officials in their proffers, and b) was not given an opportunity to refute them when the Appellate Division decided to consider those matters, despite its having precluded Mr. Justice Smith from hearing testimony on those matters. Following the opinion of the Appellate Division, petitioner filed an appeal as of right to the Court of Appeals, which was dismissed, 36 N.Y. 2d 490, 366 N.Y. Supp. 2d 1029, and sought

leave to appeal, which was denied, 36 N.Y. 2d 642, 366 N.Y. Supp. 2d 1026 (64a).

Thereupon, while pressing a petition for a writ of certiorari before this Court, which was denied (423 U.S. 838), petitioner filed the instant proceedings in the District Court, in which he alleged in detail his claims as to the denial of constitutional rights in the procedures employed by the Appellate Division (24a-34a).

In answer to the Complaint and thereafter to the Amended Complaint, respondents, the Appellate Division and the justices and the chief clerk thereof, moved to dismiss as did the respondent, the Monroe County Bar Association, claiming that the Federal court lacked jurisdiction and that the Complaint failed to state a cause of action.

In due course, the lower court rendered its opinion sustaining the motion to dismiss, but continued pending an appeal, the stay of disbarment of Mr. Turco. The

Circuit Court affirmed the ruling of the District Court on the grounds:

> "that the constitutional claims of lack of due process are barred from consideration by the federal district court under the doctrines of res judicata and collateral estoppel. Appellant raised the due process points in both the Appellate Division and in seeking review in the Court of Appeals. He emphasizes that he has done so, moreoever, as if it were a point in his favor. He does not question that he has raised the same claims in the state courts. But he contends, rather, that because he raised these constitutional claims as an involuntary respondent in the state court disbarment proceeding, a federal district court has jurisdiction to review the adverse constitutional finding of the New York state courts, including the Court of Appeals, and that this is so even where a petition for certiorari has already been filed and denied by the United States Supreme Court. The contention may not be without some merit in logic, in view of the confusion in this particular field of civil rights review by the lower federal courts, but it has been foreclosed in this circuit by our decision in Thistlewaite v. City of New York, 497 F. 2d 339 (2nd Cir.), cert. denied, 419 U.S. 1093 (1974), in which the very argument was made and rejected. There we applied collateral estoppel in a Sec. 1983 case to a constitutional determination by a state court. And in

> Tang v. Appellate Division, 487 F. 2d 138, 141 (2nd Cir. 1973), cert. denied, 416 U.S. 906 (1974), we barred relitigation of a denial of admission to the Bar because of lack of jurisdiction, citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and res judicata (Hays, J., concurring)."
>
> Opinion of Circuit Court (12a-13a)(emphasis supplied by Court)

Judge Oakes wrote a brief concurring opinion (15a) in which he emphasized that, much as he disagreed with them, he felt bound by the decisions of the Second Circuit in Thistlewaite v. City of New York, 497 F. 2d 339 (2nd Cir. 1974), cert. denied, 410 U.S. 1093 (1974) and Tang v. Appellate Division, 487 F. 2d 138 (2nd Cir. 1973), cert. denied 416 U.S. 906 (1974). He also emphasized that the Second Circuit decision was in conflict with those in a number of other circuits, particularly that of Getty v. Reed, 547 F. 2d 971 (6th Cir. 1977).

On May 23, 1977, the United States Court of Appeals for the Second Circuit granted Mr. Turco's motion to stay the issuance of the mandate pending the filing of this application pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. Mr. Turco is continuing to practice law.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT; NAMELY, WHETHER A LITIGANT WHO IS INVOLUNTARILY BROUGHT BEFORE A STATE COURT IN A PUNITIVE PROCEEDING AND MAKES SUBSTANTIAL AND NON-FRIVOLOUS CLAIMS BEFORE THE STATE COURT THAT THE PROCEDURES EMPLOYED THERE VIOLATE LITIGANT'S FEDERAL CONSTITUTIONAL RIGHTS AND PRESSES THOSE CLAIMS TO THE END OF ALL AVAILABLE APPELLATE PROCEDURES WITHIN THE STATE JUDICIAL SYSTEM AND PETITIONS THIS COURT FOR A WRIT OF CERTIORARI WHICH WAS DENIED IS BARRED BY PRINCIPLES OF *res judicata* FROM PRESENTING HIS CONSTITUTIONAL CLAIMS TO A UNITED STATES DISTRICT COURT AFTER COMPLETION OF THE STATE COURT PROCEEDINGS.

Petitioner presents for review only the federal jurisdictional question decided by the circuit court; namely, whether principles of *res judicata* prevent the Federal District Court from considering issues of denial of procedural due process in the State Court proceedings before which he was an involuntary participant and which rejected his constitutional claim. Petitioner does

not expect this court at this time to accept for review the underlying due process questions sought to be presented to the Federal District Court. It may be appropriate nevertheless,to outline petitioner's due process contentions simply to indicate their substantiality.

1) Petitioner contended that he was denied due process of law because he was not afforded an evidentiary hearing on whether the facts and circumstances surrounding his plea of guilty to a misdemeanor established unprofessional conduct. He contended that in Baxstrom v. Herold, 383 U.S. 107 (1966), Specht v. Patterson, 386 U.S. 605 (1967), and Humphrey v. Cady, 405 U.S. 504 (1972), this Court made clear that before a collateral consequence of a conviction could be imposed, a due process hearing was required to determine the issue as to whether that secondary consequence properly flowed from the convictions. He pointed out that in New York, conviction of a misdemeanor does not

necessarily, but may bring about disciplinary consequences; certainly not every common law assault or weapons possession conviction establishes professional misconduct. It was in respect to that adjudication of the collateral consequences of his conviction that petitioner claimed the right to a due process hearing under Baxstrom and the ensuing cases.

2) Petitioner contends that he was denied due process of law in that, despite a plea of innocence made under North Carolina v. Alford, 400 U.S. 24 (1970), his assertion of innocence was ignored in a wholly colateral proceeding and he was not even given the right to prove his innocence in the collateral proceeding and indeed his plea was taken as an admission of the charge to which he pleaded, despite his express denial of guilt as permitted by this Court.

3) Petitioner contends that the New York Courts accepted as dispositive and based opinions upon statements by a prosecutor of what witnesses would say if they testified

when petitioner disputed the testimony and set forth that the state witnesses would be contradicted.

The Court of Appeals acknowledged this saying:

> "We do not suggest that, if the general question were before us res nova, we would consider the due process argument as entirely frivolous." 6/ (11a)

6/ Beyond the recognition by the Circuit Court of the substantiality of the question, it should be noted that in seeming to reject one of the contentions, the Circuit Court appears to have made a factual error. The Circuit Court distinguished Baxstrom, Specht and Humphrey, all supra, on the grounds that in those cases there was no "initial voluntary submission to the consequences" (10a) whereas here there was "a plea of guilty as distinguished from a plea of nolo contendere, or a conviction after trial" (10a).

Inspection of the papers filed with this Court reveals that in fact Humphrey v. Cady clearly involved a plea of guilty (See brief before this Court, p. 4). The papers in Baxtrom v. Herold are not quite so clear but strongly suggest that that case also involved a plea of guilty. (See record on file with this Court, p. 22-23). Specht v. Patterson did in fact involve a conviction after a trial. (Record before this Court, p. 2).

Within the past few years this court has been seeking to define the role of 28 U.S.C. Sec. 1983 in fixing the balance point of Federal/State judicial relations.

Beginning with Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975) and as recently as Trainor v. Hernandez, ___ U.S. ___, 45 U.S.L.W. 4535 (May 31, 1977), the court has emphasized the need to prevent resort to the Federal Courts to obstruct ongoing or imminent (Hicks v. Miranda, 422 U.S. 332 (1975)), state criminal (Younger) or civil (Huffman) proceedings.

Aside from principles derived from the pendency of state court proceedings, there are other doctrines designed to assure that the state court has a full opportunity to pass upon the constitutional questions to the extent that the case is before it. Thus, at least in the habeas field a "judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts", Mr. Justice

Marshall in Humphrey v. Cady, 405 U.S. 504, 517 (1972) and a three judge Court in New York read Huffman v. Pursue Ltd., supra, as implying that a defendant involuntarily before a State Court "and who have a constitutional defense arising out of State actions, cannot resort to a federal forum prior to seeking a State resolution of the merits of their constitutional claim".(Milner v. Gulotta, 405 F.Supp. 182, 197 (E.D.N.Y., 1975) judgment affirmed 425 U.S. 901 (1976). Such a position seems to flow from an understandable effort to assure that state courts at least have an opportunity without federal intervention to pass upon and if need be correct constitutional deficiencies.

It seems also clear that principles of res judicata would operate to bar relitigation in a Federal Court of a claim which a party had a right to bring either in the federal or state courts but voluntarily chose the State court. Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974) cert. denied 419

U.S. 838 (1974).

This case, however, involves a wholly different issue. It is the issue presented to the court in Florida State Board of Dentistry v. Mack, 401 U.S. 960 (1971) and rejected by the court over the dissent of two justices. With the renewed emphasis of the court upon clarifying jurisdictional questions in Sec. 1983 suits and the conflict between the circuits (see infra, Point II) it seems particularly appropriate that the court grant this Petition.

On principle and on the basis of the historical design of Sec. 1983,application of the principles of res judicata are inappropriate in cases where a litigant is involuntarily before a state court, offers his constitutional arguments to that court, and then seeks to litigate in the federal courts the adequacy of state court procedures. As a commentator recently noted referring to the debate in Congress at the time of the enactment of the Civil Rights Act of 1871:

> ...the remarks in support of the legislation suggest that the debaters

would not have approved of the application of an expansive notion of res judicata in actions brought under the legislation eventually adopted. Their remarks clearly indicate that they passed the 1871 Civil Rights Act, in part, because the state courts had not adequately protected the rights to be guaranteed by the proposed legislation. Although there was little direct evidence of discrimination in state appellate court opinions, the state courts were thought to have one form of justice for Unionists and blacks and another for the Ku Klux Klan and its sympathizers. Much of the criticism was directed at the lawlessness of southern juries, but some was directed at the entire judicial system.

> It was for this reason that Congress invested the federal trial courts with original jurisdiction to enforce constitutional rights.
>
> Thies, Res Judicata in Civil Rights Act Case: An Introduction to the Problem, 70 Northwestern University Law Review 859 (1976) (footnotes omitted.)

The various limitations that have heretofore been imposed upon litigation of constitutional issues in the Federal Courts which might be considered obstructive of state court proceedings all have at their core either one of two objectives, (a) permitting and encouraging the state courts to consider

seriously federal constitutional issues (Younger, Hicks v. Miranda, Trainor) or (b) requiring a litigant who has voluntarily chosen one of two forums available to be bound by such choice (Parker v. McKeithen). But nothing in these objectives suggests that an involuntary defendant in a state court proceeding who does present litigant's constitutional issues in state court litigation, and carries them to the end, is for that reason barred by some doctrine of res judicata (or collateral estoppel or "issue preclusion") from presenting those issues to a Federal Court in litigation brought under the Civil Rights Acts.

And indeed on the face of it, no such rule can be adopted as a simple illustration will make clear. Let us suppose that a state determines that trials in cases involving maximum imprisonment of less than six months shall be conducted without counsel. Let us further assume that a defendant in such a case fully litigates the Sixth Amendment

issue in the state courts and petitions the Supreme Court for a writ of certiorari, which is denied. Can it be seriously contended that a federal court is barred in a subsequent proceeding from even considering the issue? The answer is no, of course, and that is one of the familiar functions of the writ of habeas corpus. See, Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). How then can it be suggested that the Federal-State relationship in the adjudication of constitutional issues is different when the state employs a non-custodial punitive process, e.g., when, as here, it acts against the professional livelihood of an individual and disbars him. Such a distinction can have no rational basis and introduces into the issue of the Federal-State relationship in the adjudication of constitutional issues an element of procedural chance which is inconsistent with the development of cohesive jurisdictional principles.

While the Preiser case, supra, is

cited for the proposition that principles of res judicata are applicable to a civil rights action brought under 42 U.S.C., §1983, the cases cited by the court in that case apply to particular fact patterns which do not describe the instant case.7/

The argument for the res judicata position essentially comes to the following: after all, following litigation in the State court, if the constitutional issues have been presented to the State court and the Supreme Court by way of a petition for writ of certiorari, the litigant has had adequate protection against denial of constitutional rights. Judicial economy and the need to terminate

---

7/ Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209 (6th Cir. 1970), is a case of a litigant involuntarily before the State court who did not offer to that court the issue he thereafter sought to raise in the Federal court; Jensen v. Olson, 353 F.2d 825 (8th Cir. 1965), and Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), clearly involved situations where the litigant had voluntarily elected to present his issue to a State court; Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963), involved an effort to use a §1983 proceeding where habeas corpus was obviously the proper remedy.

litigation call for the application of principles of res judicata.

But this Court has never conceived of its role as being the correction of errors below. It has never felt that it is required to grant certiorari solely because the court below erred. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Supreme Court Rules. And those special and important reasons refer to the precedential role of the case, not the correction of error.

Except in rare cases, there is no clue to the reasons for denial of a petition for writ of certiorari. The reasons may be bottomed on such matters as the overwhelming docket of this Court or a decision by the Court that the precedential value of the case is not such as to require that the Court address the problem. Sometimes the Court wishes an issue to ripen or mature in

litigation in several lower courts before it addresses the issue. And in cases coming up from State courts raising constitutional issues, a frequent reason for denying a petition for writ of certiorari is that the record below does not adequately develop the factual basis for the constitutional determination or that the lower court does not expound upon the issue so as to give the Supreme Court the benefit of prior judicial evaluation of the issues.

This last factor would be particularly appropriate in a case in which a defendant in a State court proceeding attacks the procedures before that court. In such a case it is most unusual for a State court to address its own procedural deficiencies. The instant case is a perfect example of that problem, for the Appellate Division decisions in no way hinted at the underlying constitutional deficiencies in its procedures, even though they were raised. And the New York State Court of Appeals considered "that no substan-

tial constitutional question is directly involved" (64a). And however much the petitioner sought to have the court address those questions, it refused to do so. Yet the Second Circuit considered that the due process argument was not "entirely frivolous" (11a).

This Court in this case denied a petition for writ of certiorari when the case was presented to it from the State Court and it was most unlikely under any circumstances that it would have accepted a petition for writ of certiorari at that time, since it did not have the benefit of an articulated expression, with respect to the procedural issues, from the State court. The only way those issues could ever be fully defined and properly adjudicated would be by a tribunal which considered that it had the responsibility of independently adjucating the constitutional issues. The United States District Court is obviously the first tribunal in this case which could have served that function. To restrict the functioning

of the District Court by adopting a doctrine of res judicata in the type of case where, as pointed out above, a State court is particularly unlikely to consider its own procedural deficiencies, is effectively to prevent any consideration of the issues in the federal forum.

II
PETITIONER PRESENT FOR REVIEW A DIRECT CONFLICT BETWEEN THE SECOND CIRCUIT AND THE SIXTH CIRCUIT ON A SUBSTANTIAL QUESTION.

As the concurring opinion of Judge Oakes in this case and the opinion of the Sixth Circuit in Getty v. Reed, supra, show, the Second and Sixth Circuits are in direct conflict on the jurisdictional issue in this case.

Indeed, a commentator has noted that lacking guidance from this Court on its issues here presented "the decisions of the Lower Courts teem with inconsistencies", Thies, supra, at p. 865. The author's footnote in support of the foregoing statement is as follows:

> Compare Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir.) cert. denied, 419 U.S. 1093 (1974), with Lombard v. Board of Educ., 502 F.2d 631 (2nd Cir. 1974), cert. denied, 420 U.S. 976 (1976); Roy v.

Jones, 484 F.2d 96 (3rd Cir. 1973), with Kauffman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), with Mack v. Florida State Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971) (White, J., dissenting from denial of writ); Coogan v. Cincinnati Bar Ass'n., 431 F.2d 1209 (6th Cir. 1970), with Mulligan v. Schlacter, 389 F.2d 231 (6th Cir. 1968); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), with Hampton v. City of Chicago, 484 F.2d 602, 606 n.4 (7th Cir. 1973); Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973) cert. denied, 415 U.S. 916 (1974) with Ney v. California, 439 F.2d 1285 (9th Cir. 1971).

For an analysis of these and other cases, see Averitt, Federal Section 1983 Actions After State Court Judgment, 44 U. Colo. L. Rev. 191 (1972); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250 91974) (hereinafter cited as McCormack); Veslal, State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court, 27 Okla. L. Rev. 185 (1974); Note, Relationship of Federal and State Courts, 88 Harv. L. Rev. 453 (1974); Comment, The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions, 1975 U. Ill. L.R. 95 (hereinafter cited as Illinois Comment).

It is appropriate that the Court resolve the inconsistencies among the various Circuit Court decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
c/o Center for
Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3304

Attorneys for Petitioner

Dated: New York, New York
June 14, 1977

APPENDIX

Fourteenth Amendment Section 1,
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Judiciary Law, §90

(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

(4) Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law or to be competent to practice law as such.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 438—September Term, 1976.

(Argued January 24, 1977 Decided April 21, 1977.)

Docket No. 76-7380

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

—against—

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

Before:

ANDERSON, OAKES and GURFEIN,

Circuit Judges.

Appeal from an order of the District Court for the Western District of New York (Burke, *D.J.*) dismissing appellant's amended complaint. Appellant, a member of the New York bar, sought on due process and equal pro-

tection grounds an injunction barring enforcement of a New York court order of disbarment. The Court of Appeals held that appellant's constitutional claims which had been raised in the New York state disbarment proceeding were barred by the doctrines of *res judicata* and collateral estoppel.

Affirmed.

MORTON STAVIS, New York, N.Y. (Doris Peterson and Center for Constitutional Rights, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

WILLIAM J. KOGAN, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General, and Ruth Kessler Toch, Solicitor General, of counsel), *for Defendants-Appellees Appellate Division of the Supreme Court, the Justices and the Clerk thereof.*

MICHAEL T. TOMAINO, Rochester, N.Y. (William D. Eggers, Rochester, N.Y., of counsel), *for Defendant-Appellee Monroe County Bar Association.*

GURFEIN, *Circuit Judge:*

Arthur F. Turco, Jr., a member of the New York Bar, appeals from an order of the District Court for the Western District of New York (Burke, *D.J.*) dismissing his amended complaint. Turco was disbarred by the Appellate Division, Fourth Department, by order dated January 28, 1975, *Matter of Turco,* 46 A.D.2d 490 (4th Dept.), *appeal dismissed,* 36 N.Y.2d 713, *cert. denied,* 423 U.S. 838 (1975). The complaint sought a judgment declaring that

the denial of the right of appeal to the Court of Appeals by attorneys in disbarment proceedings is a denial of federal due process.[1] Turco also sought to enjoin enforcement of the disbarment order. The defendants are the Monroe County Bar Association and the Appellate Division and members of each. Jurisdiction is based on 42 U.S.C. §§ 1981, 1983, 1985; 28 U.S.C. §§ 1332, 1343(3), 1343(4); and 28 U.S.C. §§ 2201, 2202.

The District Court temporarily enjoined enforcement of the disbarment order. After Turco in an amended complaint added as defendants the Justices of the Appellate Division, Fourth Department, and the Chief Clerk, the defendants moved to dismiss the complaint, *inter alia,* for lack of jurisdiction and on *res judicata* grounds. The District Court dismissed the complaint, but continued its "stay" until the resolution of this appeal.[2]

I

Turco was admitted to the New York Bar in December 1967. His office was in New York City but his practice, which in the beginning consisted to a large extent of assisting in the representation of the Black Panther Party and its members, required him to travel throughout the East.

Turco's difficulties with the criminal law began in 1970. In February of that year he was arrested in New York City and charged with possession of weapons, dangerous drugs, hypodermic instruments and with obstructing government administration. He was released on bail. In April he traveled to Canada, apparently without notifying the New

---

1 Turco later changed this claim from a denial of due process to a denial of equal protection.

2 Although the District Court termed its action a "stay", it apparently intended it to be a continuation of the injunction restraining enforcement of the disbarment order, rather than merely a stay of its own order.

York authorities, to make a speech at McGill University. While there he learned that he had been indicted in Baltimore, Maryland, in connection with the murder on July 12, 1969 of Eugene Anderson, a Black Panther who was suspected of being a government informer. Turco was charged with conspiracy to commit murder, assault with intent to murder, common law assault, and two charges of soliciting to commit a felony (murder and kidnapping).

Through an attorney in Maryland he attempted unsuccessfully to negotiate a release on bail if he returned from Canada. He remained in Canada, obtained a false identification card and assumed the name of Leon Wright. He testified later that he had concealed his identity to avoid extradition to the United States. Upon his failure to return to the United States, his bail in the New York case was forfeited, and he was additionally charged with bail jumping.

Seven and one-half months after he entered Canada, Turco was questioned by Canadian authorities in connection with a general widespread investigation of the kidnapping of a Canadian official. The officials accidentally discovered his real identity and learned that charges were pending against him in the United States. Extradition proceedings were commenced. Turco waived extradition and was brought back to Maryland.

In June and July of 1971 he was tried in Baltimore along with Black Panther codefendants, for the slaying of Eugene Anderson. After three weeks of trial the jury could not reach a verdict on the charges against him. His codefendants were acquitted. Another defendant, whose trial had been severed, was convicted. Before his retrial he pleaded guilty, in February 1972, to one charge of common-law assault in satisfaction of all of the charges in the May 1970 indictments. He was sentenced to a term of imprisonment of five years, with execution of the sentence sus-

pended. On his appeal the Court of Special Appeals of Maryland affirmed the judgment of conviction.

In March 1972, after moving to suppress evidence without success, he pleaded guilty in the New York prosecution to the misdemeanor charge of unlawful possession of a weapon, in satisfaction of all the charges against him, the the bail jumping charge being withdrawn. He also appealed this conviction and the Appellate Term, First Department, unanimously affirmed the judgment without opinion.

Shortly after Turco's second guilty plea, the Appellate Division, Fourth Department, in April 1972, directed that an investigation be undertaken into Turco's conduct.[3] The Monroe County Bar Association made such an investigation and on May 8, 1973, it filed a petition with the Appellate Division which alleged that Turco "is or may be guilty of professional misconduct, crime, misdemeanor or felony." Appellant was specifically charged with professional misconduct based on his conviction of two misdemeanors.

A disciplinary proceeding was begun, and Turco responded with a sixty-one page answer which reviewed his personal and professional history, including his assistance in the defense of the Black Panthers, his weapons arrest, the indictments in Baltimore, his incognito stay in Canada and the reasons for his guilty pleas. He moved for the dismissal of the charges against him and, in the alternative, asked for a full evidentiary hearing to determine whether he was guilty of the offenses to which he had pleaded guilty. This request was based on his assertion that he had entered the guilty pleas under *North Carolina* v. *Alford*, 400 U.S. 25 (1970) *(see infra)*, and that, accord-

3 Turco after his trial in Baltimore in 1971 left New York City and moved to Buffalo and then to Rochester, New York, both of which are in the jurisdiction of the Fourth Department.

ingly, he had a right to prove that he was, in fact, not guilty of the charges to which he had pleaded guilty.

Attached to the Bar Association's petition, as exhibits, were transcripts of the guilty plea proceedings on each conviction. These transcripts disclosed the other charges against Turco which had been covered by the guilty pleas and included the expected testimony of the government witnesses. Appellant had stipulated in the Maryland prosecution that certain testimony would be given against him if he elected to stand trial a second time. This testimony included details of the gruesome torture and murder of Anderson. According to the government witnesses, Turco participated in the torture and ordered the murder.[4]

The Appellate Division found Turco guilty of professional misconduct and denied his request for a hearing to determine whether he was innocent of the charges to which he had pleaded. The court did, however, grant a hearing "in mitigation of the discipline to be adjudged." [5]

Hearings were held before a Referee. Turco testified, among other things, that he was innocent of the specific charges to which he had pleaded guilty. He was not permitted to call witnesses to prove his innocence. He did call forty-eight witnesses, most of whom were character witnesses who had known him only since he came to Rochester.[6]

---

4 The man who is alleged to have pulled the trigger had been a co-defendant with Turco in the first trial and was acquitted. The vivid narrative of what the prosecution witnesses were prepared to testify to in the respective state trials is available in the Appellate Division opinion. 46 A.D.2d 490, 494-96 (4th Dept. 1975).

5 Under New York law, "an attorney convicted of a criminal offense may introduce evidence in mitigation and explanation in a subsequent disciplinary proceeding, [but] he may not relitigate the issue of his guilt of the offense for which he was convicted." *Matter of Levy*, 37 N.Y.2d 279, 280 (1975).

6 *See* note 3, *supra*.

The Referee submitted his report, and appellant was allowed to file an extensive brief and to have oral argument.

In denying an evidentiary hearing before it appointed the Referee, the Appellate Division held that *North Carolina* v. *Alford, supra,* did not support appellant's contention "that he had the right now to prove that he was not guilty of the charges" to which he had pleaded. The court noted that in *Alford,* the Supreme Court merely held that, as a matter of constitutional law, "it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made." There was no claim by appellant that either guilty plea was involuntary. The court reiterated this ruling in its final opinion disbarring Turco. 46 A.D.2d at 492.

Turco filed a notice of appeal as of right in the Court of Appeals, upon his constitutional grounds, and, alternatively, moved for an order granting leave to appeal. The Court of Appeals dismissed the appeal taken as of right for want of a substantial constitutional question, 36 N.Y.2d 713 (1975), and also denied the motion for leave to appeal, 36 N.Y.2d 642 (1975). Turco's petition for a writ of certiorari was denied. 423 U.S. 838 (1975).

While Turco's petition for certiorari was pending and before it was denied, he filed this action in the District Court. As we have noted, the District Court dismissed the action, and this appeal followed. The appellees contend that the action is barred by the doctrines of *res judicata,* judicial estoppel and full, faith and credit. We find that all the constitutional issues raised in this action were raised in the New York Court of Appeals and determined to be without merit.[7]

---

7 The following federal constitutional claims were raised in the Court of Appeals in Turco's brief for leave to appeal: (1) denial of due process: (a) denial of right to present evidence of his innocence in the disciplinary proceedings; (b) disbarment was based upon allega-

Appellant contends that he was denied due process of law because he was not afforded an evidentiary hearing on whether the facts and circumstances surrounding his plea of guilty to a misdemeanor established unprofessional conduct. The contention is, in effect, that in every case where an attorney has pleaded guilty to a misdemeanor, he may, nevertheless, in disbarment proceedings prove *de novo* that he is not guilty of the charge to which he voluntarily waived his right to trial by pleading guilty. The point is made that under the doctrine of *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), it is a general rule that collateral consequences of a conviction may not be imposed without a new hearing. But *Baxstrom* and succeeding cases cited in support, *Specht* v. *Patterson*, 386 U.S. 605 (1967), and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), deal with additional penalties imposed in the absence of an initial voluntary submission to the consequences. In the case of a plea of guilty, as distinguished from a plea of *nolo contendere*, or a conviction after trial, it is known that the voluntary plea is likely to result in collateral consequences. Here the appellant has never asserted that his pleas of

tions, unsupported by any evidence, and not contained in petitioner's charges against him; (c) appellant was foreclosed from repudiating allegations not contained in the charge which were relied on by the Appellate Division; (d) no basis for charging him with criminal convictions that were based on an "*Alford*" plea; and (2) denial of due process and equal protection because his disbarment was discriminatory and based upon mere suspicion and conjecture and not evidence. *See* Notice of Motion, Affidavit and Brief in Support of Motion for Leave to Appeal to the New York Court of Appeals, dated February, 1975, at 40-41.

He also contended in his notice of appeal as of right that if Judiciary Law § 90(8) was construed to deny a lawyer an appeal as of right from a disbarment order of the Appellate Division, the statute would be unconstitutional as a denial of equal protection of the laws, since other litigants than lawyers had the right of at least one appeal. *See* Appellant's Brief *In the Matter of Arthur F. Turco, Jr.* v. *Monroe County Bar Association*, State of New York Court of Appeals, dated February, 1975, at 11-12.

guilty were other than voluntary. And there was discussion of the possibility of disbarment as a result of the plea in each of the proceedings. He contends, further, that he pleaded guilty with a declaration of innocence, and that, hence, under *North Carolina* v. *Alford, supra,* his plea cannot be taken as an admission of the charge to which he pleaded. He further complains, in this regard, that the stipulated testimony of what the state witnesses would testify to should not have been considered in the light of his contentions to the contrary.[8] We do not suggest that, if the general question were before us as *res nova,* we would consider the due process argument as entirely frivolous. Each of these points was raised in the Appellate Division, however, and decided adversely to the petitioner. The Appellate Division found, upon a study of the sentencing record in Maryland, that appellant had withdrawn his reliance on *Alford* before the guilty plea was accepted by the court. 46 A.D.2d at 498-99. And a disavowal of reliance on *Alford,* though not in such unequivocal terms, was made in the New York plea proceeding, as well. To the extent that the contentions lack constitutional significance, they are not cognizable in the federal courts. To the extent that they possess such significance, they have already been determined adversely to appellant on the merits.

Turco claims, however, that the review of his constitutional claims in both the state courts and the Supreme Court was illusory, and that to bar his claims on the doctrine of *res judicata* "is effectively to prevent any full consideration of the issues in any forum." He argues that the constitutional review by the state courts is defective because they are "particularly unlikely to consider [their] own procedural deficiencies." We cannot agree. As

8 By pleading guilty, appellant knowingly waived his right to cross-examine the prosecution witnesses. He stipulated that their proffered testimony could be considered in the plea bargaining.

this court stated in another case involving an attorney in a New York State disciplinary proceeding, "[t]here is no reason to assume that [the attorney's] constitutional rights will not be protected by the Appellate Division . . ., or, if further review becomes necessary, by the New York Court of Appeals." *Erdmann* v. *Stevens*, 458 F.2d 1205, 1211 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

State courts, as much as federal courts, are bound by and required to follow the United States Constitution. Turco, as appellees did in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), is "urging [the Court] to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities." And like the Supreme Court, "[t]his we refuse to do." *Id.*, 420 U.S. at 611.

We hold that the constitutional claims of lack of due process are barred from consideration by the federal district court under the doctrines of *res judicata* and collateral estoppel. Appellant raised the due process points in both the Appellate Division and in seeking review in the Court of Appeals. He emphasizes that he has done so, moreover, as if it were a point in his favor. He does not question that he has raised the *same* claims in the state courts. But he contends, rather, that because he raised these constitutional claims as an *involuntary* respondent in the state court disbarment proceeding, a federal district court has jurisdiction to review the adverse constitutional finding of the New York state courts, including the Court of Appeals, and that this is so even where a petition for certiorari has already been filed and denied by the United States Supreme Court. The contention may not be without some merit in logic, in view of the confusion in this particular field of civil rights review by the lower federal courts, but it has been foreclosed in this circuit by our

decision in *Thistlethwaite* v. *City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), in which the very argument was made and rejected. There we applied collateral estoppel in a § 1983 case to a constitutional determination by a state court. And in *Tang* v. *Appellate Division*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), we barred relitigation of a denial of admission to the Bar because of lack of jurisdiction, *citing Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *res judicata* (Hays, *J.*, concurring).

We do not deal here, therefore, with the slippery question involving Section 1983 actions where the state litigation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not. On such a state of facts, the Supreme Court still has to render a definitive ruling.[9] Here the claims were actually raised, and pursued right up to the Supreme Court. In these circumstances, we are constrained to hold that the doctrine of *res judicata* is applicable, that petitioner may not have two bites at the cherry, and that the District Court properly dismissed the action.

Nor is there any doubt that appellant actually did raise in the Court of Appeals the very constitutional points he now raises. (*See* note 7, *supra*.)

Dismissal by a New York state court because the asserted federal constitutional issues were not "issues which rise to the dignity of constitutional questions" is tantamount to a dismissal of the constitutional issues on the merits. *See McCune* v. *Frank*, 521 F.2d 1152, 1155 (2d Cir. 1975). And we must assume that the Court of Appeals'

---

9 *See* dissenting opinion on denial of certiorari in *Florida State Board of Dentistry* v. *Mack*, 401 U.S. 960 (1971). *But cf. Preiser* v. *Rodriguez*, 411 U.S. 475, 477, 497 (1973); *Mertes* v. *Mertes*, 411 U.S. 961 (1973) (summarily affirming decision of three-judge court, 350 F. Supp. 472 (D. Del. 1972); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 606 n.18 (1975).

denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits.

The other argument that requires some discussion is the contention that appellant was denied equal protection of the laws because New York law permits an appeal as of right to every litigant who appears before its courts except an attorney charged in a disciplinary proceeding before the Appellate Division, which for this purpose is the court of first instance. This argument was also raised in the Court of Appeals by appellant, *see* note 7, *supra*, and presented in the petition for certiorari.[10] The claim is barred by the doctrine of *res judicata*, as we have seen. In any event, the same claim was made in *Mildner* v. *Gulotta*, 405 F. Supp. 182 (3 judge court, E.D.N.Y. 1975), which was summarily affirmed by the Supreme Court, 96 S.Ct. 1489 (1976) (with two justices favoring a postponement of consideration of jurisdiction on the merits).

If the affirmance of *Mildner* by the Supreme Court is determinative of the issue raised on the merits, it is binding upon us at least until the Supreme Court speaks further. The appellees contend that *Mildner* was a decision on the merits or, in the alternative, that it stands for the proposition at least, that a post-disbarment action in the federal court will not lie where review by the Supreme Court through the certiorari route is available.

In *Mildner* the Supreme Court did not dismiss the appeal from the three-judge court order but, as noted, summarily affirmed. This is significant because it had previously held that a "direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court

10 *See* Petition in the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of New York, Appellate Division, Fourth Judicial Department, No. 74-1592, filed June 18, 1975, at pages 15-20.

denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975). Particularly since Judge Neaher as well as Judge Moore expressed the view that the constitutional claim directed against the New York disbarment procedures was *without merit* and did not support an injunction, we read the affirmance by the Supreme Court in *Mildner*, rendered so soon after the decision in *Baxley*, to have been on the merits and controlling here. *See Godoy* v. *Gulotta*, 406 F. Supp. 692, 693 n.2 (S.D.N.Y. 1975) (three-judge court).

We consider the other issues raised as either barred by *res judicata* or as not meriting discussion.[11]

Affirmed.

OAKES, *Circuit Judge* (concurring):

I believe that *Thistlethwaite* v. *City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 410 U.S. 1093 (1974), and *Tang* v. *Appellate Division*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), were wrongly decided, for the reasons stated in my dissenting opinions in those cases. *Thistlethwaite*, like this case, involved an assertion of federal rights in a state proceeding by an *involuntary* party to that proceeding; *Tang* was erroneously supposed to involve an election to pursue state remedies, which an

11 We do not discuss abstention in view of our decision for, in this case, abstention would accomplish nothing, the state courts already having taken jurisdiction and rendered judgment on the federal constitutional claims. We recognize that in *Mildner*, *supra*, there also had been a final judgment of disbarment and that Judge Neaher, for himself, nevertheless favored abstention. This may simply have been intended to suggest that there is no appellate review of disbarment proceedings in the District Court.

applicant for admission to the bar was said to make merely by applying for admission. I note that *Thistlethwaite* is inconsistent with several cases from other circuits, *see* Thies, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 Nw. L. Rev. 859, 865-66 & n.35 (1976), and that the Sixth Circuit agrees with the dissenting opinion in *Tang, Getty* v. *Reed,* No. 76-1633 (6th Cir. Jan. 5, 1977), slip op. at 6-8. But unsound as I believe *Thistlethwaite* and *Tang* to be, emasculative as they are of 42 U.S.C. § 1983 and federal constitutional rights, I am bound to follow them as the law of the circuit. I therefore reluctantly concur in the judgment of the court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of May, one thousand nine hundred and seventy-seven.

Arthur F. Turco, Jr.,
Plaintiff-Appellant

v.

The Monroe County Bar Association, The Appellate Divicion of the Supreme Court, Fourth Judicial Department, John S. Marsh, Reid S. Moule, Richard J. Cardamone, Harry D. Goldman, Richard D. Simons, Walter J. Mahoney, Frank Del Vecchio and G. Robert Witmer, Presiding Justice and Justices for the Appellate Division of the Supreme Court, etc. et. al.,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated April 29, 1977 to stay issuance of the Mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted

GRANTED.

ROBERT P. ANDERSON per MIG
JAMES L. OAKES
MURRAY I. GURFEIN,

Circuit Judges

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,
Plaintiff

v. CIVIL 75-100

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD J. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,
Defendants

Morton Stavis
744 Broad Street
Newark, N.J. 07102
and
Robert Napier
620 Reynolds Arcade Building
Rochester, N.Y. 14614
Attorneys for Plaintiff

Michael J. Tomaino
Lincoln First Tower
Rochester, N.Y. 14603
Attorney for Monroe County Bar Association

Louis J. Lefkowitz
Attorney General of New York
The Capitol, Albany, N.Y. 12224
Attorney for defendants Appellate Division, Fourth Department and the Justices and Chief Clerk thereof (William J. Kogan, Assistant Attorney General, of counsel)

The complaint herein was filed March 11, 1975. It prayed for a permanent injunction restraining the defendants from enforcing the order of disbarment dated January 28, 1975 by the Appellate Division of the Supreme Court, Fourth Department, and a declaratory judgment declaring that the denial of the right of appeal by disbarred attorneys is unconstitutional and a denial of due process of law.

The plaintiff filed an amended complaint on May 29, 1975 adding as defendants the Presiding Justice and Justices of the Appellate Division and the Chief Clerk.

The Appellate Division, and the Justices and Chief Clerk thereof, moved to dismiss the amended complaint for lack of jurisdiction over the subject matter and over the defendants Appellate Division, and the Justices thereof, by reason of the plaintiff's failure to state a claim upon which relief can be granted and upon the basis of res judicata, collateral estoppel, and upon the provisions of the United States Constitution, Article 4, Section 1. The motion was submitted for decision on July 28, 1975.

The plaintiff was disbarred by the Appellate Division, Fourth Department, by order dated January 28, 1975. The Monroe County Bar Association brought a disciplinary proceeding before the Appellate Division charging that he had been convicted, on his guilty pleas, of two misdemeanors. The plaintiff moved to dismiss the petition, or, in the alternative, for a full evidentiary hearing at which he would be allowed to satisfy a fact-finding officer appointed by the court that he was not guilty of those charges. He asserted that he had interposed his guilty pleas under North Carolina vs. Alford, 400 U.S. 25, under which he claimed

he could enter a plea while asserting his innocence. On December 17, 1973 the Appellate Division found that by reason of the pleas of guilty the plaintiff had violated a canon of professional ethics, that he was bound by the convictions, and that despite his reliance on Alford, he did not have the right in a disciplinary proceeding to prove that he was not guilty of the two charges. The court permitted him to have a mitigation hearing if he so requested. A mitigation hearing was held before a Justice of the Supreme Court appointed to conduct the hearing and to report his findings without a recommendation. Neither the hearing nor the Justice's report dealt with the guilt or innocence of the plaintiff of the underlying charges.

Under New York Law a disbarred attorney is not allowed an appeal to the Court of Appeals as of right but must seek permission to appeal. Leave to appeal was sought but was denied by the Court of Appeals on February 19, 1975. The amended complaint alleges that the actions of the defendants had the purpose and effect of denying plaintiff his fundamental rights of due process of law and equal protection of law in violation of the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States. It further alleges that plaintiff was denied due process of law in that his disbarment was based on allegations unsupported by evidence, that he was precluded from introducing evidence of his innocence, that his disbarment was based upon allegations not contained in petition, that he was denied due process of law in that a guilty plea was considered final and binding as proof of guilt despite the fact that it was expressly made under Alford, that upon the critical question of whether

plaintiff was guilty of professional misconduct the Appellate Division denied him an opportunity for any hearing and adjudicated the issue upon no evidence, that the New York disciplinary statute denying attorneys, unlike all other New York litigants, the right to appeal from disciplinary proceedings as of right, amounted to a denial of the equal protection of laws and is unconstitutional on its face.

Section 90 of the Judiciary Law of New York provides for automatic disbarment of an attorney convicted of a felony. On conviction of a misdemeanor the matter is left to the judgment and discretion of the Appellate Division. A conviction of a misdemeanor may or may not result in disbarment. This inquiry as to whether such a conviction may establish professional misconduct, plaintiff asserts, requires a full due process hearing.

The plaintiff contends that he was not only denied a hearing on the question whether his misdemeanor convictions warranted a finding of professional misconduct, but that he was denied fair notice of the charges and an opportunity to present witnesses and to confront and cross examine his accusors.

The plaintiff contends that while it is generally true that due process does not require a state to provide litigants with appellate review, the same is not true where the state has failed to provide for a full and fair hearing in the court of original jurisdiction. He contends that the Appellate Division did not afford him as least "one fair hearing" because it adjudicated him guilty of unprofessional conduct without hearing testimony on the critical question whether the guilty pleas established unprofessional conduct, and whether in the light of the pleas, the plaintiff was in fact

guilty.

There is no merit to the contention that he was denied equal protection of laws and due process by denial of a right of appeal to disbarred attorneys. Levin vs. Gulotta and related cases, Southern District of New York (three judge court judgment), affirmed by Supreme Court of the United States, March 29, 1976.

This court should not interfere in state disciplinary proceedings, Erdmann vs. Stevens, 458 F.2d 1205 (2nd Cir. 1972), cert. denied, 409 U.S. 889. Anonymous vs. Association of the Bar of the City of New York, 515 F.2d 427 (2nd Cir. 1975).

The action is dismissed. The plaintiff shall have a stay for a period of thirty days from the date of this order to afford him an opportunity to appeal. If he shall appeal, he shall have a stay pending the appeal.

SO ORDERED and ADJUDGED.

HAROLD P. BURKE
United States District
Judge

June 30, 1976.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE No. 75-100

ARTHUR F. TURCO, JR.

v. JUDGMENT

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, et al.

This action came on for (hearing) before the Court, Honorable Harold P. Burke, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the action is dismissed. The plaintiff shall have a stay for a period of thirty days from the date of this order to afford him an opportunity to appeal. If he shall appeal, he shall have a stay pending the appeal.

Dated at Buffalo, New York, this 2nd day of July, 1976.

JOHN K. ADAMS
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,
Plaintiff,

Civil Action
No. 75-100

v.

AMENDED COMPLAINT

THE MONROE COUNTY BAR ASSOCIATION; THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT; JOHN S. MARSH, REID S. MOULE, RICHARD J. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department; and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,
Defendants.

I. PARTIES

A. Plaintiff

1. Plaintiff, Arthur F. Turco, Jr., is a citizen of the United States and a resident of the State of New York, City of Rochester.

B. Defendants

2. The defendant, Monroe County Bar Association, is, upon information and belief, an unincorporated association of attorneys and maintains its offices for the conduct of its affairs at the Reynolds Arcade, Rochester, New York.

3. The defendant, the Appellate Division of the Supreme Court, Fourth Judicial

Department, is established pursuant to the laws of the State of New York. The Appellate Division has original jurisdiction concerning matters of attorneys' admission to the Bar and any disciplinary actions concerning attorneys.

4. The defendants, John S. Marsh, Reid S. Moule, Richard J. Cardamone, Harry D. Goldman, Richard D. Simons, Walter J. Mahoney, Frank Del Vecchio, and G. Robert Witmer, are the Presiding Justice and the Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department. The defendant, Lester Fanning, is the Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department.

II. JURISDICTION

5. This is an action for injunctive and declaratory relief under Rule 57 of the Federal Rules of Civil Procedure, authorized by Title 42 U.S.C., Sec. 1981 et seq., to secure rights, privileges, and immunities established by the Fourteenth Amendment to the Constitution of the United States. Jurisdiction is also conferred on this Court by Title 28, U.S.C., Secs. 1331, 1332, and 1343(3) and (4), providing for original jurisdiction of this Court and suit authorized by Title 42, U.S.C., Secs. 1983 and 1985. Jurisdiction is further conferred on this Court by Title 28, U.S.C., Secs. 2201 and 2202.

III. STATEMENT OF FACTS

6. On or about April 1972, pursuant to an order by Presiding Justice Harry Goldman of the Appellate Division of the Supreme Court, Fourth Judicial Department, Alex Gossin, Esq., a member of the Monroe County Bar Association, Grievance Committee,

was ordered to investigate and report to the Appellate Division two misdemeanor convictions concerning the plaintiff herein.

7. Several times thereafter, Alex Gossin spoke with the plaintiff herein concerning the two misdemeanor pleas. Plaintiff spoke at length with Mr. Gossin, explaining all the surrounding the circumstances of said pleas, and also informed Mr. Gossin that he could present evidence concerning his innocence. Alex Gossin agreed at a future time and date to meet with the plaintiff herein to examine said evidence.

8. On May 8, 1973, the Monroe County Bar Association filed a petition charging the plaintiff with two misdemeanor convictions. The petition was filed in the Appellate Division, Supreme Court, Fourth Judicial Department.

9. The petition filed by the Monroe County Bar Association charges the plaintiff with two guilty pleas, both misdemeanors.

10. In September, 1973, the plaintiff moved to dismiss the petition, or in the alternative for a full evidentiary hearing on these charges since he had interposed pleas of guilty under the case of North Carolina v. Alford, 400 U.S. 25, in which he was allowed to assert his innocence while taking the pleas.

11. The Appellate Division on December 17, 1973, rejected the contentions raised and the motion to dismiss, and concluded that by reason of the pleas of guilty, the plaintiff had violated the canon of professional ethics, that he was not allowed a full hearing to explain and go behind the pleas of guilty, but that they would allow the plaintiff a mitigation hearing on

character only.

12. On March 28, 1974, the mitigation hearing was commenced before the Hon. Lyman H. Smith, a Justice of the Supreme Court of the State of New York, and was continued from time to time until May 21, 1974, when it was concluded.

13. During the mitigation hearing, there was no evidence whatsoever produced concerning the guilt of plaintiff to the two misdemeanor pleas.

14. During said mitigation hearing, there was no evidence whatsoever produced concerning anything negative about plaintiff's character.

15. At the conclusion of the mitigation hearing, plaintiff's attorney, Harold P. Fahringer, read to the hearing officer all the evidence that plaintiff would produce to show that he was innocent of the two misdemeanor charges. However, Judge Lyman Smith said that he could not accept such evidence pursuant to the Appellate Division order dated December 17, 1973.

16. Judge Smith's report was filed on October 25, 1974, with the Appellate Division, Fourth Department. Judge Smith, who was directed by the Appellate Division to report his findings to the Court without recommendations, summarized his conclusions by stating:

> "His dedication to and professional representation (after admission to the bar) of indigent black defendants without financial reward and at considerable risk to his personal reputation (and, inferentially, to his personal safety) during

a volatile period in the 1960's marked by racial and ethnic confrontation, and by student unrest, not only in the United States but throughout the world."

After said mitigation hearing and Judge Smith's filing his findings with the Appellate Division on October 24, 1974, plaintiff submitted a brief which stated in part that no evidence whatsoever was produced concerning plaintiff's guilt and in light of the fact that 48 witnesses testified on his behalf and over 200 persons signed petitions of his good character, no discipline should be meted out.

17. On January 28, 1975, the Appellate Division, Fourth Judicial Department, rendered its judgment disbaring the plaintiff.

18. The decision of the Appellate Division dated January 28, 1975, disbaring the plaintiff, contains over 14 pages based upon mere allegations which the plaintiff, by the Appellate Division order, was precluded from refuting. Said allegations, unsupported by any evidence, are totally false.

19. The Appellate Division, by its own order dated December 17, 1973, did not allow plaintiff to go behind the two convictions to prove his innocence; however, by its decision, the Appellate Division went far behind that order and found as fact, mere allegations which the defendant was not even advised that he was being charged with.

20. On February 3, 1975, the Hon. Sol Wachtler, Associate Judge of the Court of Appeals, signed a stay, pending motion to the Court of Appeals for leave to appeal.

21. On February 17, 1975, the plaintiff did submit to the Court of Appeals a motion for leave to appeal.

22. Pursuant to the laws of the State of New York, an attorney is not allowed an appeal to the Court of Appeals as a matter of right, but must seek permission of said Court to appeal.

23. On February 19, 1975, the Court of Appeals of the State of New York denied plaintiff permission to appeal.

24. On February 24, 1975, the original stay granted by Justice Wachtler of the Court of Appeals terminated.

IV. CAUSE OF ACTION

25. The actions of the defendants, as set forth above, have the purpose and/or effect of:

a) Denying to the plaintiff his fundamental rights of due process of law, all in violation of the Fifth, Sixth, Ninth, and Fourteenth Amendments of the United States Constitution.

b) The plaintiff was further denied due process of law because his disbarment was based upon allegations unsupported by any evidence. In fact, there is evidence of plaintiff's innocence, as part of the Court record in the State of Maryland, which the plaintiff offered to introduce, but was precluded by the Appellate Division order dated December 17, 1973.

c) The plaintiff was further denied due process because his disbarment is based upon allegations not contained in the Bar Association's petition of charges against

him, thus denying plaintiff the fundamental right of due process of being notified of the charges pending against him.

d) Plaintiff was further denied the fundamental right of due process of law because he was foreclosed from repudiating the allegations which were not contained in the Bar Association's petition but were relied upon by the Appellate Division in its judgment of disbarment.

e) The plaintiff was further denied due process of law and equal protection of the law because his disbarment was discriminatory and based upon mere suspicion and conjecture rather than evidence.

f) The plaintiff was further denied due process of law because the two pleas entered were based upon the doctrine of North Carolina v. Alford, in which the plaintiff asserted his innocence at the time of taking the pleas, and was thus precluded from raising that same question of innocence during said disciplinary proceeding.

g) Plaintiff was further denied due process in that the Appellate Division denied any due process hearing on the question whether misdemeanor convictions established professional misconduct.

h) The plaintiff was further denied due process of law in that the denial by the Court of Appeals of leave to appeal is a violation of the Constitution of the United States. The Appellate Division, in a disciplinary proceeding, acts as a court of original jurisdiction which, pursuant to the Rules of the Court of Appeals, does not grant an attorney the right to appeal but requires him to seek permission, all in violation of the due process of law provided

for in the Constitution of the United States.

26. The actions on behalf of the defendants, Monroe County Bar Association, Appellate Division of the Supreme Court, Fourth Judicial Department, and the individual defendants, the Presiding Justice and Justices of the Appellate Division, and the Clerk of said Division, together, have denied the plaintiff his most fundamental rights of due process and equal protection of the law, as guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States, in that, among other things, the Appellate Division and the Monroe County Bar Association and the individual defendants, by court order, refused to let the plaintiff introduce evidence of his innocence and go behind the two pleas entered, while in the Appellate Division a decision of disbarment, date January 28, 1975, went far behind said pleas and found as fact, unsupported allegations, while denying the plaintiff the opportunity to disprove said allegations by introducing evidence, part of which is contained as a matter of court record in the State of Maryland.

27. Unless this Court restrains and enjoins the defendants from enforcing their Order of Disbarment, the plaintiff will suffer and continue to suffer serious, immediate, and irreparable injury in that:

a) Said disbarment will have the immediate effect of interfering and impeding efforts of the plaintiff to prepare adequately for the defense of certain defendants now or about to face trial.

b) Said disbarment against the plaintiff will have an immediate and irreparable effect upon the exercise of fundamental

due process rights of the Constitution of the United States.

c) The said disbarment of the plaintiff has resulted in serious and irreparable injury to his professional reputation as a lawyer and has illegally and unconstitutionally punished and penalized him without due process of law, as well as subjected him to public scorn and ridicule.

d) The said disbarment of plaintiff has resulted in unemployment and loss of income, which damage threatens his livelihood and that of his wife and two small children.

28. The plaintiff has no adequate remedy at law.

29. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, plaintiff prays for the following relief:

1. That a permanent injunction be issued:

a) Restraining the defendants and each of them, their agents, employees and attorneys and all others acting in concert with them and their successors, from enforcing the Order of Disbarment dated January 28, 1975, by the Appellate Division of the Supreme Court, Fourth Judicial Department.

b) That a Declaratory Judgment issue declaring that the denial of the right of appeal by the State of New York, as applied to attorneys pursuant to New York Judiciary Law, Sec. 90, and Article 6,

Sec. 3 of the New York Constitution, when the Appellate Division is sitting as a court of original jurisdiction, is unconstitutional and a denial of due process of law, as defined by the Constitution of the United States.

2. That this Court grant plaintiff such other and further relief as may seem to it to be appropriate.

Attorneys for Plaintiff

MORTON STAVIS
744 Broad Street
Newark, New Jersey 07102

CHARLES GARRY
1256 Market Street
San Francisco, Calif.

RAMSEY CLARK
Attorney of Counsel for
Plaintiff
37 West 12th Street
New York, New York

LEONARD I. WEINGLASS
Attorney of Counsel for
Plaintiff
2902 1/2 Ocean Front Walk
Venice, Calif.

WILLIAM M. KUNSTLER
Attorney of Counsel for
Plaintiff
853 Broadway
New York, New York 10003

MARGARET L. RATNER
Attorney of Counsel for
Plaintiff
351 Broadway
New York, New York

DORIS PETERSON
Center for Constitutional
Rights
853 Broadway
New York, New York 10003

ROBERT NAPIER
620 Reynolds Arcade
Rochester, New York

Dated: May 29, 1975

December 17, 1973

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: DEL VECCHIO, J.P., MARSH, MOULE, CARDAMONE, SIMONS, J.J.

In the Matter of ARTHUR F. TURCO, Jr., an attorney, Respondent,

Monroe County Bar Association, Petitioner.

Upon reading and filing the petition of the Monroe County Bar Association, verified the 8th day of May, 1973 by Anthony R. Palermo, President, alleging that respondent is or may be guilty of professional misconduct in his office as an attorney and counselor at law, together with the exhibits annexed thereto, the answer of Arthur F. Turco, Jr., filed the 21st day of June, 1973, in which he requests that the charges be dismissed, or, in the alternative, for other relief, together with the appendix annexed thereto, and after hearing Mr. Bruce E. Hansen and Mr. Michael F. Tomaino, of counsel for petitioner, and Mr. Harold P. Fahringer, of counsel for respondent, and due deliberation having been had thereon,

This Court hereby finds that respondent is guilty of professional misconduct in his office as an attorney and counselor at law, and

It is hereby ORDERED, that if respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the Court within twenty days from the date of the entry of this order and such hearing will be accorded to him.

Memorandum: In Maryland, respondent was indicted and tried for conspiracy to commit murder, assault with intent to murder and other crimes. After the jury disagreed and a new trial was ordered, respondent plead guilty to common law assault. Thereafter, respondent was arrested and charged in the Criminal Court of the City of New York with possession of dangerous weapons and ammunition therefor, possession of dangerous drugs and other crimes. He plead guilty to possession of a dangerous weapon in violation of §265.05 of the Penal Law in full satisfaction of these charges and an additional charge of jumping bail and fleeing the jurisdiction. By reason of the above two convictions of respondent the Monroe County Bar Association has petitioned this Court under Section 90 of the Judiciary Law for disciplinary action against him. In his answer, respondent admits the convictions but seeks to prove that in fact, he was not guilty

of the charges to which he plead guilty; and he asserts that the petition is insufficient in law and he moves for its dismissal. We conclude that the petition is sufficient and that the motion should be denied. We also conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead. In Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, in accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). No claim is made here that respondent's pleas were not voluntary.

Although respondent suggests that his pleas were reluctantly made and were similar to pleas nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 5) the plea of nolo contendere has been abolished in New York (Ando v. Woodberry, 8 N.Y. 2d 165, 170), and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh , 17 N.Y. 2d 479, 481), we deem the two convictions to be final and binding upon him.

These acts of which respondent stands convicted constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules, No. 1-102(A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession, and will find his highest honor as an honest man; and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law. For such misconduct respondent should be disciplined.

If respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the court within 20 days of the entry of the order hereon, and such a hearing will be accorded to him.

It is hereby further ORDERED, that pursuant to Judiciary Law, §90, this Order, being intermediate, is confidential and not published.

Enter.

LESTER A. FANNING

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

In the Matter of Arthur F. Turco, Jr.,
an attorney, Respondent,

Monroe County Bar Association,
Petitioner.

Decided: January 28, 1975

PRESENT: HON. JOHN S. MARSH, Presiding Justice
HON. REID S. MOULE,
HON. RICHARD D. SIMONS,
HON. WALTER J. MAHONEY,
HON. FRANK DEL VECCHIO,
Associate Judges

APPEARANCES:

MICHAEL T. TOMAINO
Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, New York 14603
Attorney for Petitioner

BRUCE E. HANSEN, ESQ.
Wiser, Shaw, Freeman &
Van Graafeiland
Lincoln First Tower

Rochester, New York 14603
Attorney for Petitioner

HERALD PRICE FAHRINGER, ESQ.
One Niagra Square
Buffalo, New York 14202
Attorney for Respondent

OPINION

Per Curiam:

Respondent was admitted to the New York Bar on December 21, 1967 in the First Department. He practiced law in the metropolitan area and environs for several years, and in August, 1971 he moved to Rochester, employed as attorney for the new Bail Fund established in Rochester. After six months that employment terminated and he entered private practice in Rochester and vicinity.

In February, 1972 in Baltimore, Maryland he entered a plea of guilty of common-law assault, a misdemeanor, in satisfaction of May, 1970 indictments against him and others, including a charge of conspiracy to murder and assault with intent to murder, and he was sentenced to a term of five years in the custody of the Department of Correction; but the sentence was suspended and he was released on condition of good behavior for five years. In respect of this, the sentencing judge said,"If, as Mr. Kunstler suggests, Mr. Turco intends to leave Maryland and take up his activities elsewhere, I can see no useful purpose to be served by active supervision by the Probation Department."

Thereafter, on March 8, 1972 in the Criminal Court of the City of New York, New York County, respondent entered a plea of guilty of unlawful possession of a weapon in violation of Section 265.05

of the Penal Law, as a misdemeanor, in satisfaction of multiple charges made against him and another in February, 1970, including possession of dangerous weapons and drugs, and, later, bail jumping and fleeing the jurisdiction, and he was given a sentence of conditional discharge. He continued to practice law in the Monroe County area.

Under date of May 8, 1973, following a year-long investigation, the Monroe County Bar Association filed a petition with this Court attaching thereto the proceedings underlying the above convictions, and asked this Court to determine whether respondent should be disciplined by reason of such convictions. Respondent appeared, interposed an extensive answer and moved for change of venue to the First Department, and, in case that was denied, for a hearing on the validity of the convictions as predicates for disciplinary proceedings. We denied the motion for change of venue and received briefs on the question of the right of respondent to present evidence to prove that in fact he was not guilty of the crimes for which he was convicted. In support of his contention, respondent relied on North Carolina v. Alford (400 U.S. 25).

We concluded that the Alford case does not support respondent's contention; that in Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indict-

ment, provided the plea is voluntarily made (see, accord, People v. Clairborne, 29 N.Y. 2d 950; People v. Foster, 19 N.Y. 2d 150; People v. Griffin, 7 N.Y. 2d 511). As we shall point out later herein, no claim is made, nor can there be, that either of respondent's above guilty pleas was involuntary.

Although respondent suggested that his pleas were reluctantly made and were similar to pleas of nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y. 2d 586), the plea of nolo contendere has been abolished in New York (Ando v. Woodbury, 8 N.Y. 2d 165, 170) and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges to avoid convictions for the more serious charges and the severe sentences likely to be imposed thereon. We ruled, therefore, that in the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh, 17 N.Y. 2d 479, 481) the convictions were final and binding upon him. We concluded that the acts to which respondent pleaded guilty constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules No. 1-102 (A)(3)(5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession and will find his highest honor

as an honest man and as a patriotic and loyal citizen, and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law; and that for such misconduct, respondent must be disciplined. We gave respondent the opportunity, however, to have a hearing in mitigation of the discipline to be adjudged.

Respondent requested such a hearing, and a justice of the Supreme Court was designated to hear and report the evidence presented on such hearing. The hearing was held over a period of seven days and is contained in 800 pages of minutes. Respondent called over 45 witnesses, about 40 of whom were from the Rochester area who did not know respondent before he came to Rochester in 1971 and did not know anything of his prior conduct. They testified to his high ability as a lawyer and his good character. The hearing justice gave respondent full leeway and opportunity to explain his conduct and his reasons for pleading guilty. Respondent's testimony and supporting evidence submitted in refutation of the evidence which the State's Attorney in Maryland and the District Attorney in New York stated to the respective courts that they would present on trial of respondent if he did not plead guilty, was detailed and quite complete. In consideration of the matter of mitigation we have reviewed the evidence underlying the charges against

respondent which led to his plea of guilty in each of his convictions, and his explanations thereof.

In 1968, soon after he was admitted to the Bar, respondent began employment by William Kunstler in Manhattan. He soon was engaged in representing the Black Panther Party. He testified that Messrs. Kunstler, Lefcourt and he were the first attorneys to represent the Black Panthers on the East coast of the United States, that their services required respondent's appearance in various cities from New England southerly in the East coastal States to Maryland, and that the services were rendered for little or no fee, as the circumstances required. He also represented other indigent persons. He assisted Mr. Lefcourt in a nine-months' trial of the so-called "Panther 21" in New York City.

In February, 1969,members of the Black Panther Party in Baltimore, Maryland were accused of arson, bombing and other crimes. Members of that Party who were residents in New York were extradited to Maryland, and respondent went there to represent them. From the statement of testimony which the State's Attorney of Maryland advised the Criminal Court of Baltimore, at the time of respondent's conviction there, that he was prepared to present against respondent upon his second trial and which respondent stipulated would be the testimony against him, it appears that in the early summer of 1969 respondent was en-

gaged in rendering more than normal legal services for the Black Panthers in Maryland. He joined members of the Black Panther Party on the streets of Baltimore in passing out editions of the Panther paper; he presided over political action classes of the Black Panther Party; and he took an active part in the activities of that Party there. He testified that he also traveled to many eastern United State cities, setting up police control districts, a project sponsored by the Black Panthers, and he advised the Party in connection therewith.

It was stipulated before the Maryland court that if the second trial of respondent were to proceed, the State's witnesses would testify to the following facts:

In early July, 1969, one Eugene Leroy Anderson joined the members of the Black Panthers Party and respondent in the distribution of Black Panther literature on the streets of Baltimore. On July 10 Anderson appeared at the Black Panthers' headquarters in Baltimore and became involved in an argument with certain members there. It appears that a Captain of the Panthers had been demoted and some members wanted him restored. There was also suspicion that some members were divulging to the police certain Black Panther activities. A number of Black Panthers forcibly carried Anderson upstairs, followed by respondent. There Anderson was slapped, punched and beaten. On one occasion he

fell against a file cabinet and respondent grabbed him and threw him to the floor, and another member kicked him in the groin causing him to yell out in pain. A cloth was stuck in his mouth to quiet him. Water in a pan was brought to boil. sugar was put into it and a hunting dagger was heated in it. The dagger was then placed in the skin under his eye and turned "rolling it down the face, which removed the first layer of skin on Anderson's face." The same thing was then done to his chest. A member took Anderson by the head, placed a .38 caliber revolver against it and said that he was going to kill him. Another member lit a cigarette and placed it against Anderson's face under his eye, burning him. Members present, including respondent, continued beating Anderson, sometimes with bed slats. Respondent then said, "We can't keep him here; we have to off him," meaning "We have to get rid of him [Anderson], we have to kill him." Anderson was kept there under guard all night and the next day, and was tied up and put in a closet. Anderson was called a "pig" who had been caught-- apparently squealing.

Two Black Panther members, Loney and Wyche, who had supported the demoted Captain, were berated by one Mitchell. Respondent was present at the time and encouraged Mitchell in his derogatory remarks against them. Mitchell and respondent told them that they could get back in the good graces of the Party by disposing of Anderson and respondent told them to "go ahead and do what they had to do with Anderson."

The State's Attorney stated to the court that Loney would testify that Wyche and he, with one Johnson, then drove out to find a spot where they could kill Anderson, and they found one. That night after respondent had finished presiding over a Black Panther political action class, he told Wyche and Loney to "go and do what you have to do," meaning "get rid of Anderson." Later that night, July 11, Wyche, Loney, Johnson, Young and another got a gun and took Anderson in an automobile to the spot previously selected. Loney stayed in the car while the others took Anderson into the woods. Loney heard the gun blast, and the escort soon returned without Anderson. Wyche reported that he had shot Anderson.

The State's Attorney stated that another witness, Barbara Zentz, would testify that she expected respondent to come to her house that evening on a social visit. He was late, and she fell asleep waiting for him. He came after 1:30 a.m. on July 12 and awakened her. He was extremely agitated and had a revolver in his hand which he waved, and he said that if "they" (meaning the authorities) came to get him, "he would take some of them with him." He asked her to hide him but she declined.

In October, 1969 the body of Anderson was found in Leakin Park, Baltimore, and it was duly identified.

On February 22, 1970 in Manhattan, New York the police, acting on a tip, apprehended four adults and found that one of them was carrying an automatic gun. They arrested the four and were about to place them in police cars to take them to the stationhouse when three other men appeared, one being Alan Weiser, a lawyer. He told the police that they had no right to arrest the four or take them in, and he stood between the men and the police cars to prevent such police action. The other two with Weiser aided him, and so the police also arrested the three. Weiser gave his address as 674 W. 161st Street, Apartment 6-G.

Officers Valois and Nichols then went to that apartment and kocked. Someone within asked who was there, and they replied "Police officers." It happened that there was an uncovered peephole in the door, and Officer Valois looked in and saw a man standing there holding a gun in his hand. The man (James Grace) dropped the gun and started running down the hall of the apartment. Officer Valois broke into the apartment and found that the gun was a M-1 carbine loaded with a banana clip of 30 rounds of bullets. He caught Grace in the kitchen and he called out that everyone was under arrest. Respondent and two girls then came out of a door near the kitchen. In the living room the officers saw a shotgun leaning against the window and 12 live shells on the windowsill; and they found on an end table two plastic

bags, one containing marijuana and the other 125 green pills. While Officer Nichols was lining up his prisoners he heard a door open to his left. He looked and saw into a room next to the kitchen holstered revolvers and bandoliers full of shells on top of a valise only about five feet from him. He immediately seized them.

Respondent then spoke up, saying, "What are you guys doing? All these guns are registered." Officer Nichols said, "What about the small guns?", and respondent answered,"These weapons are all mine and they are all registered." Respondent admitted that he and his girlfriend, whom he later married, were also living in the apartment.The officers found 75 hypodermic needles in the apartment; and they learned that the revolvers were not registered or licensed.

On February 23, 1970, Weiser and respondent were charged with possession of dangerous weapons, dangerous drugs, hypodermic instruments and obstructing government administration. Respondent pled not guilty and he was released on bail. His motion to suppress the guns, ammunition, drugs and his statements that the guns were his was denied.

On the mitigation hearing herein, respondent testified that in the course of his activities in behalf of liberal causes he made many speaking appearances and that in late April, 1970 he went to Montreal, Canada to make a speech at McGill University, intending

to return in a day or two. The fact that he was out on bail did not deter him from leaving the State without permission. He did not, however, speak in Montreal.

On May 1, 1970 respondent was indicted in Maryland along with Mitchell, Wyche and another for conspiring to murder Eugene Leroy Anderson on July 11, 1969; and he also was indicted with Mitchell and others for assaulting Anderson with intent to murder him and for common law assault. Respondent testified that McGill University cancelled his speech on learning of his indictment. Respondent learned of the indictment almost immediately and he testified that through an associate attorney in Baltimore he unsuccessfully negotiated to be released on bail if he returned to Maryland.

Respondent remained in Canada for 7 1/2 months. During this time he forged a lost identification card which came into his possession, falsifying it as his own, and he assumed the name of Leon Wright. He made no attempt to appear in the case pending against him in Manhattan and his bail there was forfeited. In mid-October, 1970 an official in Canada was kidnapped, a state of emergency was declared and the police investigated thousands of persons. In the course of this investigation, respondent was "picked up" and he gave his name as Leon Wright, using his false identification card. His identity was discovered, however; and the police, on

learning that he was under indictment for murder in Maryland, notified the Maryland authorities, and they began an extradition proceeding against him.

In the course of such extradition proceeding, respondent signed a waiver, and in mid-December, 1970 he returned to Maryland with two Maryland police officers, where he was kept in jail until the end of his three weeks' trial in June and July, 1971. The jury acquitted the other defendants indicted with respondent, but they disagreed as to him. He was then released on bail, awaiting a new trial, and in the following month he first came to Rochester, as before stated. Although the other above-mentioned persons indicted with respondent were acquitted, one Irving Young was tried separately for the murder of Eugene Leroy Anderson and he was convicted thereof.

In February, 1972 the State's case against respondent in Maryland came on for retrial. At that time on February 14, 1972 respondent was represented by Mr. Buchman of Baltimore and Mr. Kunstler of New York. Only one of the four indictments (Nos. 2313, 2314, 2315, 2316) against respondent was called for trial, to wit, No. 2314, and Mr. Buchman stated that respondent would plead guilty to the second count thereof, that is, common law or simple assault, in satisfaction of all the indictments against him. The State's attorney told the court that the State recommended accepting the plea, being mindful that the first trial took

three weeks and that the second trial would probably take longer, that respondent had already spent many months in jail awaiting the first trial, and that by pleading guilty to assault, respondent was exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment proceedings in New York. Before considering whether the court would accept respondent's plea with the State's approval, Presiding Judge J. Harold Grady had respondent sworn and he questioned him to ascertain whether his plea was voluntarily made. The court elicited that respondent was an attorney at law and fully acquainted with the law of his case and his legal rights and had thoroughly discussed his case with his attorneys before offering to make his plea and was doing so voluntarily.

The court then called upon the State's attorney to present for the record the evidence which the State asserted supported the guilty plea. The State's attorney stated that respondent's attorney had stipulated that the evidence which the State's attorney was about to recite, including the names of the respective witnesses, would be the State's proof if the case proceeded to trial, and respondent's attorney agreed that such was the stipulation. The substance of such testimony was set forth above in describing the events surrounding the beating and shooting of Eugene Leroy Anderson. The testimony

also described the use by respondent of the falsified identification card in Canada and the false name of Leon Wright and the fact that he remained in Canada for 7 1/2 months until termination of the extradition proceedings against him.

Following such statement of the State's evidence, Mr. Kunstler, for respondent, stated the nature of the evidence which the defense would present were the case to proceed to trial. He stated that he would present evidence to show that respondent was in New York City, not Baltimore, on July 10 through July 12, 1969; and Mr. Kunstler stated that respondent contends that "he was totally innocent of all the charges." The court then said:

> "It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford; It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant."

* * *

"As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts.

Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis."

MRS. O'CONNER: Correct. We would ask the entire portion starting 'If Mr. Turco were called to the stand . . .' to be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

MR. KUNSTLER: I would agree to that.

The court then stated:

> "So that there be no misunderstanding of the state of the record in this case, at the outset of the State's recital of its evidence there was a stipulation that this would be the State's evidence as produced on direct examination. There has been no

> stipulation or agreement by the State as to what the evidence offered by the defendant might be, so that there has been no stipulation on the part of the State to any evidence which would support the outline as given by Mr. Kunstler. Since the State's outline of its evidence clearly supports the plea of guilty, the crime of assault, and since the defendant elects to present no evidence to controvert this charge, the Court finds that there is in fact a factual basis for the plea of guilty to the crime of assault."

Before pronouncing sentence, the court concluded as follows:

> "As has been pointed out in the discussion here today, the defendant, Arthur Turco, is not a member of the Bar of the State of Maryland. However, I believe that there have been some suggestions that he has offered his services as an attorney to some persons in this jurisdiction who are charged with criminal offenses. The possibility of Mr. Turco participating in the defense of any criminal case in this State would depend upon his being presented to the Court by local counsel with a re-

> quest that he be permitted to participate in that one case only on a case-to-case basis. Speaking for myself only, and not attempting to speak for any other court in this jurisdiction, I would make it clear that if such an occasion would arise in the future, Mr. Turco would not be permitted by this Court to act as counsel in any criminal case at trial before this Court."

On March 8, 1972 respondent appeared in the criminal court of the City of New York, New York County, and offered to plead guilty to illegal possession of a dangerous weapon, a gun, in satisfaction of all charges against him, including bail jumping and fleeing the jurisdiction. His attorney, Mr. Lefcourt, stated that respondent had no knowledge of the presence of the handguns or marijuana in his apartment where he was arrested and that the hypodermic needles were for respondent's use as a diabetic. He did not attempt to explain why 75 hypodermic needles were needed for such purpose. He asserted that his plea was under North Carolina v. Alford, (400 U.S. 25, supra) and that respondent still claims that he was innocent.

The District Attorney replied that the facts "clearly demonstrate the guilt of the defendant," and he proceeded to recite them, as reviewed above; but he concluded by stating that he was willing to accept the one

plea in full satisfaction of all charges against respondent. Respondent's attorney stipulated that the People's witnesses would testify to the facts recited by the District Attorney.

The court then questioned respondent and ascertained that his plea was made freely and knowingly; and he added, "After having entered this plea, do you understand I will not permit you to withdraw it under Alford v. North Carolina, on the basis of your assertion of innocence, later on?" and respondent answered, "I understand, your Honor."

Respondent appealed from the judgment convicting him in Maryland. The appeal was argued on March 2, 1973 and on June 13, 1973 the court of Special Appeals of Maryland affirmed the judgment.

Respondent appealed from the judgment convicting him in New York County of illegal possession of a dangerous weapon, and on December 19, 1972 the Appellate term of the First Department unanimously affirmed the judgment.

With respect to the New York County conviction respondent testified on the mitigation hearing that he had moved into the Manhattan apartment only a few days before his arrest; that he brought with him two guns, the shotgun and the rifle, which he had formerly used for hunting; and that he registered them when he moved to Manhattan. he stated that the revolvers and ammunition there-

for were in the room of his co-defendant, Weiser, in the apartment and their presence was unknown to respondent. He admitted that he had in the apartment up to 200 shells for his shotgun and up to 150 shells for his rifle. He testified that when he told the officers that the guns were his he was referring only to the shotgun and rifle and not to the unlicensed revolvers, despite the officer's testimony that respondent's statement was in response to his question about the small guns. Respondent offered no explanation of how the shotgun and the rifle, purportedly used only on rare occasions for hunting, wer both in the living room with live ammunition in them and openly at hand.

Respondent further testified that the reason he falsified the identification card in Canada and carried it and used the name of Leon Wright was to avoid arrest and extradition to the United States.

Respondent reiterated on cross-examination that he pled guilty in Maryland and in New York County with full knowledge of the charges, facts and law and did so voluntarily and on advice of his counsel.

The essence of respondent's testimony on the mitigation hearing was (1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there, and that is principally why he pled guilty rather than stand trial.

His wife's ill health and his lack of funds for counsel fees for his defense were also stated as important considerations; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileges persons, largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so.

The petition herein charges respondent with misconduct by reason of the two convictions above described. We have determined that such misconduct requires that he be disciplined. In an effort to mitigate the discipline to be adjudged, respondent presented his version of the facts underlying and surrounding the convictions. In considering such testimony we necessarily have reviewed the countervailing proof, to wit, the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt, many of which facts were admitted by respondent or not denied. Those alleged facts and respondent's answers thereto are necessarily weighed by us in considering respondent's character and his respect for the law and his responsibility to the Bar as a lawyer.

The Maryland court accepted the recommended plea of common assault; but it clearly did not view the crime as a mere street corner fist-fight, for it imposed a five-year sentence, suspended during respondent's good behavior. After respondent's arraignment in New York County on the various charges there, the court recognized respondent's position as a member of the Bar and released him on bail on his own recognizance, thus relying on his integrity as an attorney-at-law to abide by the rules governing persons released on bail and to be available at all times for the prosecution of the case. Under such circumstances his admitted jumping bail, which in itself constituted the commission of a felony (Penal Law §205.40), shows a significant lack of good character. Although this fact is not a basis upon which the petition rests, in his testimony in mitigation respondent has adverted to his incognito stay in Canada, and such testimony must be considered in light of all the surrounding facts.

The evidence in behalf of respondent shows that he engaged in representing people who desperately needed representation and who often had difficulty finding able counsel, and that he, as an attorney, had a proper concern for underprivileged persons. The testimony of the many witnesses who testified to respondent's good character must, however, be recognized as based upon his conduct since he came to Rochester in 1971, during which time he was subject to the Maryland and New York County charges or

the pressure of the Bar Association's investigation for his prior misconduct. Were the admitted facts in this proceeding to appear on the record of an applicant for admission to the Bar, without doubt the application would be summarily denied.

In his argument in mitigation of respondent's conduct and consequent punishment, his counsel likens respondent's actions to those of an attorney who has been charged with tax fraud or tax evasion. We cannot accept such comparison. Defendant has been charged with crimes involving gross moral turpitude, including violence and a display of utter lack of moral responsibility. Even in his testimony at the mitigation hearing he evinced no showing of remorse or recognition of wrongdoing. Respondent's conduct in 1969 and 1970, as recited above, reveals that he had little respect for legal processes insofar as they applied to him and his ambitions. He left the arena of the lawyer in the proper defense of clients charged with crime and joined his clients in criminal activity and when caught in the web of the law, he refused to abide by lawful mandates and undertook illegal means to evade the law and conceal himself. He flouted the law. His actions were completely un-lawyer-like, unprincipled and far below any minimum standard of proper professional conduct. Such conduct in a practicing lawyer cannot be tolerated. For his admitted actions herein we have no choice

but to order that he be disbarred and that his name be stricken from the roll of attorneys of the State of New York.

An order should be entered accordingly.

Marsh, P.J., Moule, Simons, Mahoney and Del Vecchio, J.J., concur.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February A.D. 1975.

PRESENT, Hon. Charles D. Breitel,
Chief Judge, presiding.

4 No. 154

In the Matter of Arthur F. Turco, Jr.,
Appellant,

vs.

Monroe County Bar Association,
Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Clerk

In The

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

against

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

BRIEF FOR RESPONDENTS THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, THE JUSTICES AND CLERK THEREOF IN OPPOSITION TO GRANTING CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-8160

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

Table of Cases (Continued)

In the

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

against

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

BRIEF FOR RESPONDENTS THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, THE JUSTICES AND CLERK THEREOF IN OPPOSITION TO GRANTING CERTIORARI

Statement

The Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, the Justices and Clerk thereof, submit this brief in opposition to the petitioner's application for certiorari to review the decision

of the United States Court of Appeals for the Second Circuit. The Court of Appeals decision affirmed the order of the District Court for the Western District of New York (BURKE, D.J.) dismissing the amended complaint. The United States Court of Appeals found that the doctrine of *res judicata* is applicable because the petitioner's "claims were actually raised [in the prior disbarment proceedings in the New York State Courts], and pursued right up to the Supreme Court."

The petitioner instituted this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 upon the grounds that certain of New York State's disbarment procedures denied him his constitutional rights of due process and equal protection of the law.

Questions Presented

Does the dismissal by the United States Court of Appeals on the grounds of *res judicata* of an action brought by an attorney ordered disbarred by New York State Courts present special and important reasons for the granting of certiorari where the questions raised by the plaintiff in the Federal action were actually raised by him both in the Appellate Division and in the Court of Appeals of the State of New York as well as in the Supreme Court of the United States on his application for certiorari in the State disciplinary proceeding?

Facts

In view of the narrow issue presented upon this application, an exhaustive review of the underlying facts will not be presented herein. A full discussion of the factual basis for the order of disbarment is contained in the opinion of the Appellate Division (46 A D 2d 490 [1975]) as well as in the opinion of the United States Court of Appeals for the Second Circuit (____F. 2d____, 4/21/77). In brief, the facts are as follows:

The petitioner, Arthur F. Turco, Jr., was disbarred by the New York State Appellate Division, Fourth Department, by an order dated January 28, 1975. The disciplinary proceedings against the petitioner had begun on or about April 4, 1972 when the Appellate Division directed

that an investigation of petitioner's conduct be conducted by the Monroe County Bar Association, the Bar Association of the County in which Turco practiced law. That investigation resulted in the filing of a petition in the Appellate Division which alledged that the petitioner "is or may be guilty of professional misconduct" in his office as an attorney. The petition alleged specifically that Mr. Turco had been indicted in Baltimore, Maryland on May 1, 1970 on charges of murder, conspiracy to commit murder, soliciting to commit a felony (murder), common law assault and soliciting to commit a felony (kidnapping). The petition further alleged that on February 14, 1972 Turco entered a plea of quilty* to the charge of common law assault (a misdemeanor), all other charges being dropped. The petition also alleged that Turco had been arrested in New York City on February 22, 1970 on charges of possession of dangerous weapons, possession of dangerous drugs, possession of hypodermic instruments and obstructing governmental administration. Turco pleaded quilty** to a violation of New York Penal Law § 265.06 (a misdemeanor) on March 8, 1972.

Mr. Turco's answer to the petition did not deny these allegations. Indeed, as the opinion of the United States Court of Appeals notes, Turco himself elaborated on the charges against him when he adverted during the course of the disciplinary proceedings to his "incognito stay in Canada" while he was free on bail pending his criminal proceedings and for which he was additionally charged with bail jumping. Both Turco and his counsel were heard by the Appellate Division after which that Court, in a memorandum-decision and order dated December 17, 1973, found that Turco was guilty of professional misconduct as an attorney.

The Appellate Division held that Turco was bound by his guilty pleas and that he did not have a right to relitigate the underlying facts. The Court did offer to him

---

*The conviction on the plea of guilty was affirmed on appeal.

**The conviction on the plea of guilty was affirmed on appeal by the New York Appellate Term.

a "hearing in mitigation" to determine the discipline to be imposed. The purpose of the hearing was to enable Turco to offer testimony bearing upon his character and ability as an attorney. After receiving the hearing officer's report, which was submitted without recommendation, the Appellate Division ordered that Turco be disbarred (*Matter of Turco*, 46 A D 2d 490).

In the New York State Court of Appeals, Turco argued that as a result of the manner in which the disciplinary proceedings had been conducted he had been deprived of his right to due process and equal protection of the laws.

Turco's appeal to the New York Court of Appeals as of right was dismissed "upon the ground that no substantial constitutional question is directly involved." (36 N Y 2d 713 [Feb. 19, 1975].) Turco's motion for leave to appeal to the Court of Appeals was denied (36 N Y 2d 642 [Feb. 19, 1975]) as was certiorari to this Court (423 U.S. 838 [Oct. 6, 1975]). Turco commenced this action in the United States District Court for the Western District of New York on March 11, 1975 subsequent to the dismissal of his appeal to the Court of Appeals but prior to the denial of certiorari by this Court. He sought declaratory and injunctive relief against the disbarment order.

The United States District Court for the Western District of New York "temporarily" enjoined enforcement of the disbarment order*. On June 30, 1976, the Court (BURKE, D.J.) rendered a decision and order dismissing plaintiff's action stating:

> "There is not merit to the contention that he was denied equal protection of laws and due process by denial of a right of appeal to disbarred attorneys. Levis vs. Gulotta and related cases, Southern District of New York (three judge court judgment), affirmed by Supreme Court of the United States March 29, 1976.
>
> "This court should not interfere in state disciplinary proceedings, Erdmann vs. Stevens, 458 F. 2d. 1205 (2 Cir. 1972), cert. denied, 409 U.S. 889. Anony-

---

*Petitioner has continued to practice law to the present by virtue of injuctive relief obtained from the several Courts to which the case has been brought.

mous vs. Association of the Bar of the City of New York, 515 F. 2d. 427 (2 Cir. 1975)."

The United States Court of Appeals for the Second Circuit held that the petitioner's constitutional claims of denial of equal protection of the laws and lack of due process are barred from consideration by the Federal district court under the doctrines of *res judicata* and collateral estoppel. With regard to petitioner's claim that *res judicata* should not apply to the constitutional arguments he had made in the New York State Courts because he was an involuntary respondent in the State disciplinary proceeding, the Second Circuit rejected petitioner's contention holding that such an argument:

> "*** has been foreclosed in this circuit by our decision in *Thistlewaite* v. *City of New York*, 497 F. 2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), in which the very argument was made and rejected. There we applied collateral estoppel in a § 1983 case to a constitutional determination by a state court. And in *Tang* v. *Appellate Division*, 487 F. 2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), we barred relitigation of a denial of admission to the Bar because of lack of jurisdiction, *citing Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *res judicata* (Hays, J., concurring).
>
> "We do not deal here, therefore, with the slippery question involving Section 1983 actions where the state ligitation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not. On such a state of facts, the Supreme Court still has to render a definitive ruling. Here the claims were actually raised, and pursued right up to the Supreme Court. In these circumstances, we are constrained to hold that the doctrine of *res judicata* is applicable, that petitioner may not have two bites at the cherry, and that the District Court properly dismissed the action."

ARGUMENT

POINT I

THE OPINION OF THE UNITED STATES COURT OF APPEALS PROPERLY HOLDS THAT THE INSTANT ACTION IS BARRED BY THE PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL; THE OPINION IS IN CONFORMITY WITH THE OVERWHELMING MAJORITY OF RELEVANT AUTHORITY.

The petitioner's brief in this Court limits the issue presented on this application to the question of whether the principle of *res judicata* was properly invoked by the United States Court of Appeals in affirming the District Court order dismissing the amended complaint herein. The petitioner contends that the significance of the dismissal of this action on the basis of *res judicata* results from an alleged divergence of opinion amongst the Circuits as to the applicability of *res judicata* under the circumstances of this case as well as from the substantiality of the underlying due process questions sought to be presented to the Federal District Court.

The respondents suggest that the alleged inconsistencies in the decisional law on the *res judicata* question have been greatly exaggerated and in any event have no application herein. Further, as to the merits of this action, as will be argued briefly in Point II (*infra*), it is equally clear that the issues raised in the amended complaint have been addressed by the Courts on other occasions and, as discussed in the opinion below, have been resolved in each instance, in support of the respondents' position and contrary to the petitioner's.

Petitioner concedes, as he must, that principles of *res judicata* operate to bar relitigation in a Federal court of a claim which a party had a right to raise in a prior action brought either in the Federal or State courts but voluntarily chose the State court (citing *Parker* v. *McKeithen*, 488 F. 2D 553 [5th Cir., 1974], cert. den. 419 U.S. 838 [1974]). It is equally well settled that *res judicata* "has been held to be fully applicable to a civil rights action brought under § 1983." (*Preiser* v. *Rodriguez*, 411 U.S.

475, 497, 36 L. Ed. 2d 439, 93 S. Ct. 1924 [1973]); *cf. Huffman* v. *Pursue*, 420 U.S. 592, 606, fn. #18) Petitioner's attempted distinction of the instant case from previous authority, is, it is submitted, more apparent than real. As the Court below noted, this is not a case where the State litigation was involuntary as to the petitioner and where the constitutional points could have been raised but were not. "Here the claims were actually raised, and pursued right up to the Supreme Court" (Petitioner's Appendix, p. 13A). The decision of the Court below herein is supported by substantial authority throughout the circuits (*Lovely* v. *Laliberte*, 498 F. 2d 1261, 1263-64 [1st Cir., 1974], cert. den. 419 U.S. 1038; *Thistlewaite* v. *City of New York*, 497 F. 2d 339 [2d Cir., 1974], cert. den. 419 U.S. 1093, 42 L. Ed. 2d 686; *Roy* v. *Jones*, 484 F. 2d 96 [3d Cir., 1973]; *Coogan* v. *Cincinnati Bar Ass'n.*, 431 F. 2d 1209, 1211 [6th Cir., 1970]; *Blankner* v. *City of Chicago*, 504 F. 2d 1037, 1041-43 [7th Cir., 1974], cert. den. 421 U.S. 948, reh. den. 422 U.S. 1029; *Chasteen* v. *Trans World Airlines, Inc.*, 520 F. 2d 714 [8th Cir., 1975]; *Francisco Enterprises* v. *Kirby*, 482 F. 2d 481, 484-485 [9th Cir., 1973], cert. den. 415 U.S. 949; *Spence* v. *Latting*, 512 F. 2d 93, 97-99 [10th Cir., 1975], cert. den. 423 U.S. 1056).

Petitioner's reliance upon *Getty* v. *Reed*, 547 F. 2d 971 (6th Cir., 1977) is clearly misplaced as appears from the following statement in that opinion (at p. 974):

> "Without reference at this point to such questions as the substantiality of the claims or to such defenses as res judicata and collateral estoppel, we hold that the district Court had jurisdiction of the complaints."

The Court in *Getty* went on to distinguish its previous holdings in *Ginger* v. *Circuit Court for the County of Wayne*, 372 F. 2d 621 (6th Cir., 1967), cert. den. 387 U.S. 935 (1967) and *Coogan* v. *Cincinnati Bar Association*, 431 F. 2d 1209 (6th Cir., 1970) rather than to find a conflict therewith as suggested by the petitioner. Similarly, the support for petitioner's argument which he urges exists in *Kauffman* v. *Moss*, 420 F. 2d 1270 (3d Cir., 1970) cert. den.

400 U.S. 846 (1970); *Mulligan* v. *Schlacter*, 389 F. 2d 231 (6th Cir., 1968); and *Ney* v. *California*, 439 F. 2d 1285 (9th Cir., 1971) is nonexistent in that there was not a proper basis for the invocation of the doctrine of *res judicata* in the cited cases due to the absence of the issue in the prior proceedings in the State courts. While *Mack* v. *Florida State Board of Dentistry*, 430 F. 2d 862 (5th Cir., 1970), cert. den. 401 U.S. 960 (WHITE, J., dissenting from denial of writ) departs from the mainstream of pertinent precedent, cited above, it is significant that that decision predates, and consequently did not have the benefit of the current trend in this area of the law (see, *e.g.*, *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 [1975]; *Thistlewaite* v. *City of New York*, 497 F. 2d 339 [2d Cir., 1974], cert. den. 419 U.S. 1093 [1974]; *Tang* v. *Appellate Division*, 487 F. 2d 138 [2d Cir., 1973], cert. den. 416 U.S. 906 [1974]).

In summary, the petitioner asks this Court to grant certiorari in an action in which this Court has already examined the merits of his argument and denied certiorari in the New York State disciplinary proceedings (*Matter of Turco*, 46 A D 2d 490 [4th Dept.], app. dsmsd. 36 N Y 2d 713, cert. den. 423 U.S. 838 [1975]) and he bases his argument in this application upon alleged inconsistencies which close scrutiny reveals to be ephemeral.

POINT II

THE MERITS OF THE PETITIONER'S CONTENTIONS MADE AND REVIEWED FIVE TIMES IN THE NEW YORK STATE COURTS AND IN UNITED STATES COURTS DO NOT WARRANT FURTHER REVIEW BY THIS COURT.

The petitioner's arguments challenging the New York State disbarment procedures have not been made in the Appellate Division, Fourth Department, the New York State Court of Appeals, the United States Supreme Court, on application for certiorari, the United States District Court for the Western District of New York and the United States Court of Appeals for the Second Circuit. Petitioner thus seeks a sixth judicial review of

his disbarment and would have this Court consider his due process and equal protection arguments for the second time.

The respondents submit that the disbarment order, issued two and one-half years ago, has now been subjected to every judicial scrutiny to which a litigant can be entitled and that the time has come for the implementation of the lawful order of the Appellate Division.

The United States Court of Appeals for the Second Circuit thoroughly examined petitioner's due process and equal protection arguments in addition to its finding that the complaint should be dismissed on the grounds of *res judicata* and collateral estoppel. That Court distinguished petitioner's reliance upon *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Specht* v. *Patterson*, 386 U.S. 605 (1967); and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), which petitioner urges this Court to consider in his argument that the secondary consequence of disbarment improperly flowed from his criminal convictions. In addition to the rationale of the Court of Appeals opinion, it should be noted that here we are dealing with a secondary consequence — petitioner's disbarment — which was conducted according to procedures which have previously and most recently been approved by this Court in its affirmance in *Mildner* v. *Gulotta*, 405 F. Supp. 182 (three-judge court, E.D.N.Y., 1975), affd. 96 S. Ct. 1489 (1976)*. The absence of a demonstration of merit to petitioner's constitutional arguments thus removes any warrant for review by this Court.

---

*Respondents reply upon the principal enunciated in *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804, 43 L. Ed. 2d 636 (1975) that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below."

CONCLUSION

PETITIONER'S APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: July 12, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New york
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General
of Counsel

In The

Supreme Court of the United States

October Term, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

vs.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, et. al.,

Respondents.

BRIEF FOR RESPONDENT MONROE COUNTY BAR ASSOCIATION IN OPPOSITION

MICHAEL T. TOMAINO, ESQ.
Attorney for the Monroe County Bar Association
2200 Lincoln First Tower
Rochester, New York 14604

Of Counsel,
William D. Eggers, Esq.
Rochester, New York

Daily Record Corporation
Rochester, New York

(3054)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

vs.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT et. al.

Respondents.

BRIEF FOR RESPONDENT MONROE COUNTY BAR ASSOCIATION IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, an attorney disbarred by an order of the Appellate Division of the Supreme Court of New York on January 28, 1975 (Matter

of Turco 46 A.D. 2d 490 (4th Dep't), appeal dismissed, 36 N.Y.2d 713, motion for leave to appeal denied, 36 N.Y. 2d 642, cert. denied., 423 U.S. 838, (1975)), seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit, which affirmed a judgment dismissing petitioner's amended complaint. In his amended complaint, petitioner sought to have the District Court review the disciplinary proceedings against him in the New York State courts on the grounds of alleged denials of due process of law. The Court of Appeals affirmed the dismissal of the actions on the grounds that res judicata bars the relitigation of issues presented to, and determined by, the New York State courts.

This Court denied Mr. Turco's prior petition for a writ of certiorari to the Court of Appeals of New York State (No. 74-1592; Turco v. Monroe County Bar Association of the State of New York, 423 U.S. 838 (1975)).

The facts pertinent to this petition are ably stated in the opinion of the Second Circuit (Gurfein, J.) reproduced at pages 4a-9a of Petitioner's Appendix. Petitioner's statement of the case has departed from fact in several important particulars, calling for the following corrections.

A. Petitioner was afforded ample opportunities to be heard in the disciplinary proceedings.

Petitioner represents that he received no hearing in the Appellate Division before that Court determined (a) that the convictions in New York and Maryland were binding and could not be relitigated in the disciplinary proceedings, and (b) that these acts constituted professional misconduct for which discipline was warranted. That representation is, at best, misleading[1] and it requires a statement

1. Petitioner objects to New York's rule that "an attorney convicted of a criminal offense may introduce evidence in mitigation and explanation . . . . [but] he may not relitigate the issue of his guilt of the offense for which he was convicted." Matter of Levy, 37 N.Y. 2d 279, 280 (1975). Compare, Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506, 517 N. 17, 18 (E.D.N.Y. 1975).

of the various hearings at which petitioner was able to, and in fact did, present his contentions.

In response to the written complaint served by the Bar Association,[2] petitioner filed a 61 page answer (with lengthy attachments). In his answer, petitioner denied none of the allegations in the written charges. He reviewed his personal history, his involvement with the defense of various Black Panther cases, his weapons arrest in New York City, his trip to Canada, his first trial in Maryland on the charges related to the death of Eugene Anderson, and his reasons for his pleas in New York City and Maryland. Petitioner concluded his answer with the request for a hearing in

---

2. On April 4, 1972 the Appellate Division ordered the Monroe County Bar Association to conduct an investigation on this matter.

which he might be permitted to prove his innocence of the charges to which he pled guilty.

By a motion before the Appellate Division, petitioner attacked the sufficiency of the complaint and pressed his contention that he was entitled to relitigate the facts established by the Maryland and New York convictions. At the hearing on this motion, petitioner's contentions were ably presented in writing and by oral argument of his retained counsel (Petition p. 35a).

After the Appellate Division determined that the written charges against petitioner were sufficient and "the acts of which [Mr. Turco] stands convicted constituted professional misconduct" (Petition pp. 35a-38a),

petitioner was granted a full hearing in mitigation[3], which ultimately covered seven days of testimony. While Mr. Turco was not permitted to introduce evidence (apart from his own testimony) to establish his innocence of the charges of which he was convicted, he was given:

> . . . full leeway and opportunity to explain his reasons for pleading guilty. [Mr. Turco's] testimony and supporting evidence . . . was detailed and quite complete.[4] (Petition p. 44a; 46 A.D. 2d at 493)

---

3. Petitioner complains that the mitigation hearing was after the Appellate Division's determination that some disciplinary action was warranted. It should be noted that this determination was made with full recognition of the circumstances set forth at length in petitioner's answer and after petitioner had the opportunity for oral argument and written briefs.

4. The same explanation of the circumstances of the pleas, set forth by petitioner to establish the "bona fides of [his] demand for a hearing..." (Petition pp. 12-15) was exhaustively presented to the Appellate Division.

After the mitigation hearing, Mr. Turco had the opportunity to review and respond to the written report prepared by the hearing justice. He submitted a further extensive brief. His attorney was granted a further hearing to present oral arguments before the Appellate Division.

Following the Appellate Division's order of disbarment, petitioner served a notice of appeal to the New York Court of Appeals and also moved for leave to appeal.[5] Consistent with the practice of the New York Court of Appeals, there was no oral argument on this motion; petitioner submitted a 51 page affidavit in support of his right to appeal, fully

---

5. See N.Y. CPLR 5601, 5602. An appeal may be taken as of right from a final order "where there is directly involved the construction of the constitution of the state or of the United States . . . "

presenting to that Court the same issues that he thereafter presented in the District Court. The Court of Appeals denied Mr. Turco's motion for leave to appeal (36 N.Y. 2d 642) and dismissed his appeal taken as of right "upon the ground that no substantial constitional question is directly involved" (36 N.Y. 2d 490).

Accordingly, while petitioner asserts that he was denied a due process hearing, the record clearly establishes the contrary.

B. Both the State and Federal Courts have found that Petitioner's pleas were not made with a protestation of innocence.

Petitioner represents to this Court that his pleas in New York and Maryland were made with the vigorous claim that he was innocent of all charges. He fails even to acknowledge that each court that has considered the issue has concluded that this representation is contrary to the record. (46 A.D. 2d at

492; Petition, p. 11a) If petitioner has a good faith basis for continuing to advance this apparently false claim, he has failed to set it forth.

In the Maryland plea proceedings, the prosecutor stated the substance of the testimony that would be offered by the prosecution if the case proceeded to trial. In mitigation of the sentence, counsel for petitioner stated the nature of the evidence that the defense would present, including an alibi defense. The prosecutor objected to defense counsel's declaration that petitioner contends that "he was totally innocent of all charges." The assertion of innocence was stricken from the record after a conference at the bench as follows:

> THE COURT: It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the plea and that it was

being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina vs. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant.

MR. KUNSTLER: I don't think we have really said there is a conflict with that aspect.

* * *

THE COURT: As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

MRS. O'CONNOR: Correct. We would ask the entire portion starting "If Mr. Turco were called to the stand..." be deleted at this point and the plea continue with the completion of the last witnesses, Mr. Clerk.

MR. KUNSTLER: I would agree to that.

As stated by the Second Circuit (Petition p. 11a), "a disavowal of reliance on Alford, though not in such unequivocal terms, was made in New York plea proceedings as well."

Even if the record of the New York plea proceedings sustained petitioner's claim that he there asserted an "Alford plea" (and we are inclined to accept that claim), petitioner's direct testimony in the mitigation hearings rebuts his claim that he believed himself to be innocent of all charges against him in New York City.[6] That testimony shows that petitioner

---

6. Petitioner has sometimes qualified his claim by stating that he was "innocent of the specific charges to which he pleaded guilty." (Petition, pp. 11-12; emphasis added.) With that qualification, his claim allows for the possibility that he was guilty of other charges involved in the plea bargaining.

recognized that he might be guilty of at least one charge:

> Q. [Petitioner's counsel] ... Tell us about the disposition of the case in New York City...
>
> * * *
>
> A. . . . The district attorney stated very clearly that there was no evidence that I lived there; in fact, there was evidence to the contrary that I did not live there. I was just staying there for a while. However, they did add a charge against me for bail jumping when I was in Canada in Montreal. The New York case was continuing and I did not appear. Other persons, I understand, had been there had warrants against them, the cases were finally dismissed against everybody except me, and so I went back to New York in March. The district attorney informed me that they had added another charge to me of bail jumping.
>
> So I was in New York and I spoke with Gerald Lefcort about what we should do. There was no doubt in my mind that we could prove my innocence of the gun charges. There was no doubt in my mind. The only question was whether or not, what we could say about bail jumping was that defensible position because I was in Canada when I was supposed to appear in New

> York, and we had thought it would be advisable to avoid that issue since that issue might tend to include a moral turpitude issue, and it was resolved again with the district attorney that I took a plea under the Alford case, where I maintained my innocence and which was put in the record.
>
> Q. Was the bail jumping charge dismissed?
>
> A. Yes, the bail jumping charge and all the rest of the charges were dismissed.
>
> Q. What was the disposition of the case in New York City?
>
> A. I took a plea to a misdemeanor, possession of weapons, and I received a conditional discharge of three years.
>
> (Emphasis Added)

C. The "Stay in Canada".

Petitioner makes no mention of a further subject that he voluntarily introduced in his answer and his direct testimony in the

mitigation hearings.[7] In February 1970, petitioner was arrested in New York City and charged with possession of weapons, dangerous drugs, and hypodermic instruments. He was released on bail. He went to Montreal to give a speech, apparently without notifying the New York authorities. Before the speech, petitioner learned that he had been indicted in Baltimore in connection with the murder of Eugene Anderson. Petitioner learned through an attorney that he would not be granted bail if he returned to Baltimore. Petitioner's planned speech was thereupon cancelled, and he remained in Canada for seven months using the assumed name of Leon Wright, in an effort to avoid

---

7. Petitioner has asserted that, during the mitigation hearing, "nor was there any evidence concerning anything negative about petitioner's character." (Petition, p. 12) We assume that petitioner has inadvertently neglected the facts of his activities in Canada.

arrest and extradition. He was, however, arrested and identified when questioned by Canadian authorities in connection with a general investigation of a kidnapping. After extradition proceedings were begun, petitioner waived extradition and returned to Baltimore with a police escort. (See, 46 A.D.2d at 496-497, 501; Petition, p. 6a)

Although "bail jumping" and the "stay in Canada" were not the basis of the Bar Association's charges against petitioner, these facts were voluntarily introduced by petitioner. These matters were addressed in his answer, his testimony, and the briefs -- with no claim that these matters were not a proper subject for consideration by the court.

ARGUMENT

POINT I

THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT AND THE SIXTH CIRCUIT ON THE ISSUE PRESENTED BY THIS RECORD.

The Second Circuit properly observed that this record does not present the issue on which the Supreme Court has yet to render a definitive ruling: i.e., "where the state litigation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not." (Petition p. 13a.) As stated by the Second Circuit (Petition, p. 12a), "[Petitioner] does not question that he has raised the same claims in the State courts."

It is only by ignoring the posture in which the issue was raised, as well as the reasoning and holding of the case, that petitioner can claim that Getty v. Reed, 547 F.2d

971 (6th Cir., 1977), is in conflict with the determination by the Second Circuit in the instant case. Getty v. Reed involved an attack on the three-tiered procedure for disbarment of Kentucky lawyers in which the Kentucky Court of Appeals decides guilt and penalty after hearing oral argument on a record developed before a trial panel. The Sixth Circuit held that the District Court had jurisdiction of the complaints because the plaintiffs raised an attack on the constitutionality of the State procedural statutes and regulations and sought the convening of a three-judge court. However, except with respect to a First Amendment claim that one lawyer's right of freedom of speech was curtailed by disciplinary action based on his statements during a state court trial, the Sixth Circuit affirmed the dismissal on the grounds that the due process claims were not substantial.

The Sixth Circuit in Getty v. Reed expressly noted that its decision was "[w]ithout reference at this point to... such defenses as res judicata and collateral estoppel" (547 F.2d at 974) because such defenses "could only properly be pled and considered before the three-judge court itself" (547 F.2d at 975). The Court in Getty v. Reed expressed its continued adherence to Ginger v. Circuit Court for the County of Wayne, 372 F.2d 621 (6th Cir., 1967), cert. denied, 387 U.S. 935 (1967) and Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir., 1970), both of which bar the relitigation of issues raised and decided in state court disciplinary proceedings. (See 547 F. 2d at p. 974.) To the extent that the court in Getty v. Reed expressed any view that the District Court might have "jurisdiction" to consider claims arising from disciplinary proceedings (547 F.

2d at p. 974) or expressed agreement with Judge Oakes' dissenting opinion in Tang v. Appellate Division of the New York Supreme Court, 487 F. 2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974), these statements are dicta. Those views are consistent, as well, with the Court's observation that the defense of res judicata was premature in the posture of Getty v. Reed.

Nor is there any substantial conflict on this point among the several circuits. Mack v. The Florida State Bd of Dentistry 430 F.2d 862 (5th Cir., 1970), cert. denied, 401 U.S. 960 (1971, White, J. dissenting from denial of writ), appears to be the only instance in which a federal court, overruling the defense of res judicata, permitted the relitigation in a Section 1983 action of issues actually determined in state court. The Circuit Courts have otherwise uniformly applied res judicata to Section 1983 actions. E.g., Roy v. Jones, 484

F.2d 96 (3rd Cir. 1973); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), cert. denied, 397 U.S. 951 (1970); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Blankner v. City of Chicago, 474 F. 2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Anderson v. Lecon Properties, Inc. 457 F.2d 929 (8th Cir.) cert. denied, 409 U.S. 879 (1972); Francisco Enterprises, Inc. v. Kirby 482 F.2d 481 (9th Cir. 1973), cert. denied, 415 U.S. 916 (1974). Where res judicata has not been applied, it is because the record did not show that the question sought to be raised in federal court was put in issue and determined in the state court proceedings. E.g. Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970); Mulligan v. Schlacter [Schlachter], 389 F.2d 231 (6th Cir., 1968); Ney v. California, 439 F.2d 1285 (9th Cir., 1971). In one further case advanced as

illustrating the "inconsistencies" (Petition, p. 39), the court held that res judicata did not apply where the plaintiffs in the federal court action were not parties to the judgment in state court. Hampton v. City of Chicago, 484 F.2d 602, 606 n.4 (7th Cir., 1973).

This court's view of the subject has been indicated with sufficient clarity in Preiser v. Rodriguez, 411 U.S. 475, 497 (1973), citing (among others) Coogan v. Cincinnati Bar Association, supra. There is therefore no overriding reason for any further pronouncement on this issue at the present time.

POINT II

THE DECISION OF THE COURT BELOW IS PLAINLY CORRECT

In contending that the principles of res judicata are inappropriate in Section 1983 cases, petitioner relies on examples drawn from criminal law. Petitioner apparently ignores

the fact that a specific statutue authorizes the lower federal courts to entertain applications for a writ of habeas corpus. He then advances his view of public policy and suggests that the writ of certiorari is an insufficient guaranty that state courts will adhere to the dictates of due process of law.

These flimsy contentions are lacking in substance. Petitioner's analogies are inappropriate because the writ of habeas corpus arises from a specific grant of authority to the federal courts to review the constitutional validity of custodial confinement. Preiser v. Rodriguez, 411 U.S. 475, 495 (1973). Petitioner has not even attempted to demonstrate that Section 1983, by its language or its central purpose, confers upon the lower federal courts the power to exercise appellate review over civil proceedings in the state court. He fails to mention the consistent holdings of

this Court that the District Courts do not have jurisdiction to review state court proceedings for possible constitutional error. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923); Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1971).

If Petitioner's argument were to be accepted (in spite of its lack of substance), then the Federal District Courts would have jurisdiction under Section 1983 to exercise review over every state civil proceeding in which due process contentions (or other constitutional arguments) were raised. This result would be not only contrary to the results in Rooker and Atlantic Coast Line Railroad; it would be contrary to fundamental notions of our federal system. Plainly, it would take something more than the petitioner's view of public policy to warrant such a drastic change

in the long standing relationships between the state and federal judicial systems.

POINT III

THE CLAIMS THAT PETITIONER SEEKS TO PRESENT IN DISTRICT COURT ARE INSUBSTANTIAL.

Even if there were sufficient reason to consider the res judicata issue as it applies to Section 1983 cases, this record provides a particularly unlikely vehicle for that consideration. The record is replete with issues of state substantive law, independently justifying the discipline imposed. Moreover, the issues that petitioner seeks to raise in District Court lack substance.

Petitioner finds solace in the Second Circuit's statements that his claims may not be "entirely frivolous" (Petition pp. 26, 36; emphasis supplied). That comment, however, must be considered in context with the Second Circuit's further statement (Petition, p. 11a):

> To the extent that the contentions lack constitutional significance, they are not cognizable in the federal courts. To the extent that they possess such significance, they have already been determined adversely to [Turco] on the merits."

The New York Court of Appeals summarily rejected petitioner's due process claims on the merits by dismissing his appeal "upon the ground that no substantial question is directly involved." (36 N.Y. 2d 713)

On the question of the substantiality of petitioner's contentions, the determination by the New York Court of Appeals falls closer to the mark. Petitioner has identified three contentions, the first of which is allegedly based on Specht v. Patterson, 386 U.S. 605 (1967). The principles of Specht provide no assistance to petitioner. He was made expressly aware at the time of both of his guilty pleas that the convictions might have collateral consequences affecting his standing

as an attorney. The prosecuting attorney in the Maryland proceedings stated that one of the considerations for accepting petitioner's plea to a reduced charge was "...that by pleading guilty to assault [Mr. Turco] is exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment procedures in New York." See, 46 A.D. 2d at pp. 498-499. Similarly, in the New York proceedings, the prosecutor made the following statement in recommending sentence:

> Mr. Corriero: Your honor, I believe, is aware that defendant is an attorney and an officer of the Court and admitted to practice in the State of New York. I believe, under the circumstances, that the charges against the defendant are extremely serious, and that the Court should consider this in imposing sentence on this defendant.

In the disciplinary proceedings before the Appellate Division, petitioner was given ample opportunity to be heard on whether these

convictions evidenced professional misconduct. Even assuming that Specht requires a due process hearing before disciplinary sanctions could flow from petitioner's criminal convictions, petitioner was afforded every opportunity to be heard that due process might contemplate.

Petitioner's argument based on North Carolina v. Alford also lacks any degree of substance. His position is without basis in fact because, as earlier demonstrated, he was not permitted to make an Alford plea in Baltimore. Whether he asserted his innocence in the New York proceedings is not material because he thereafter admitted that he lacked a defense to the "bail jumping" charge and found it "advisable to avoid that issue..." There is, moreover nothing in Alford that protects a defendant who pleads guilty in the face of strong evidence of guilt from the imposition of

collateral consequences which were actually known to the defendant at the time of his criminal conviction. Petitioner's claim based on Alford is utterly fallacious both factually on this record and as a matter of law. E.g., Tempo Trucking and Transfer Corp. v. Dickson, 405 F. Supp. 506 (E.D.N.Y. 1975).

There is no merit in petitioner's final contention: that the Appellate Division accepted as dispositive the offers of proof in Baltimore and New York when petitioner entered his pleas to the reduced charges. Petitioner claimed that his pleas were motivated by ill health, lack of funds and hostile judicial attitudes. It thereby became necessary for the Appellate Division to consider the totality of the circumstances of the pleas as such circumstances were actually stated on the record when the pleas were made. These circumstances naturally included the nature of the underlying

charges, the factual foundations offered by the prosecutors, the prosecutors' reasons for recommending the acceptance of a plea to a reduced charge and the position there stated by and on behalf of Petitioner. In reciting the circumstances of the underlying charges, the Appellant Division relied on the summary of the testimony of the prosecution's witnesses, to which petitioner had stipulated. (Petition, p. 8a) This review was made necessary by petitioner's claims regarding the motivation of his pleas, because it thereby became clear that one further reason for the pleas was the strong factual support for the cases against him.[8]

---

8. Indeed, when a mistrial was declared in petitioner's first trial in Maryland, the jury was split 9-3 in favor of conviction. Turco v. Allen, 334 F. Supp. 209, 210 (D. Md. 1971).

That the Appellate Division reviewed the factual foundation stated by the prosecutors at the times of the pleas does not, of course, warrant petitioner's conclusion that the Appellate Division found him guilty of charges to which he had not pled guilty.

CONCLUSION

For the reasons stated, the petition should be denied.

Dated: July 15, 1977

Respectfully submitted,

MICHAEL T. TOMAINO, ESQ.
Attorney for the Monroe
County Bar Association
2200 Lincoln First Tower
Rochester, New York 14604

Of Counsel,
William D. Eggers, Esq.
Rochester, New York

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS (Con't.)

TABLE OF CASES

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-1816

ARTHUR F. TURCO, JR.,
Petitioner,

vs.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner submits this brief in reply to the responses submitted by the Monroe County Bar Association and the Appellate Division, as well as the Justices and Clerk thereof.

I.
RESPONDENT BAR ASSOCIATION HAS DISTORTED AND EVEN MISSTATED THE RECORD IN AN ATTEMPT TO MAKE IT APPEAR THAT PETITIONER HAD EFFECTIVELY ADMITTED TO HAVING COMMITTED HEINOUS CRIMES WHEN HE PLEADED GUILTY TO SIMPLE ASSAULT.

A major thrust of the respondent Bar Association's brief is its attempt to distort and even misstate the record in an effort to make it appear that petitioner had effectively admitted to having committed heinous crimes when he pleaded guilty to a simple assault.

By its attempt to suggest that there was such an admission -- as distinguished from an unproved, and indeed withdrawn, charge of murder in Maryland 1/ -- respondent hopes to overcome the major Due Process issue which is at the heart of this case. Since this seems to be the crux of the Bar Association's argument, it seems important that we analyze it in some detail and show how the Bar Association has misstated and distorted the record.

1/ There are also charges of considerably lesser impact arising out of the conviction in New York. The procedural issue arising from the denial of Due Process is essentially the same except that as to the New York proceedings even the Bar Association is "inclined" to accept the claim that Mr. Turco continued to protest his innocence despite his plea (Brief of Bar Assn., p. 11).

The essential procedural issue in this disbarment proceeding is the following: How did the Appellate Division proceed from the fact that Mr. Turco had pleaded guilty to a simple assault to a finding that he had committed a series of horrendous acts which justified disbarment?

Obviously, the Appellate Division expanded upon the conviction of the simple assault. Its responsibility under the New York law was to make an individualized determination as to whether a particular conviction of a misdemeanor established professional misconduct and, if so, what punishment should be imposed. What would have been the proper procedure for that individualized determination? Either a) it could have provided a procedure which had the essential elements of Due Process of law, as a result of which it could make viable findings that in fact the petitioner, who in the record had been convicted of a misdemeanor, had committed acts of such seriousness as to establish professional misconduct which merited disbarment, or b) it could rely on an admission.

The Appellate Division did not pursue the first of these alternatives. It made a finding of fact without the most elementary features of Due Process of law. The Bar Association, apparently aware that this was improper, attempts to shore up that finding by claiming it was based on an admission.

Throughout this litigation, petitioner has contended that he has not had a hearing providing the bare essentials of Due Process. And there

hardly seems much dispute about that. After all, with respect to the entire story of the murder, which appears in the Appellate Division's decision, pp. 46a-48a, and which is obviously the basis for the disbarment, not a single witness has given inculpatory testimony in any forum -- not the Maryland courts, nor any court of the State of New York, nor before the hearing officer -- and since there has been no inculpating testimony, there was obviously no confrontation.

Since a clear charge and proof thereon, including presentation of witnesses and the right of cross-examination, seem to be the minimal essentials of Due Process of law and the essence of a "day in court," which were lacking here, the question is, what else did the Appellate Division rely upon?

Petitioner's position all along has been that the Appellate Division relied upon disputed and unestablished assertions by a prosecutor as to what the government's case would be in Maryland. Since by definition it would be a denial of Due Process for the Appellate Division to base a finding of fact thereon, the respondent Bar Association has tried to distort the record to make it appear that the basis of the Maryland proceeding was an admission by Mr. Turco that he had participated in a murder.

We proceed to an analysis of the record.

At the outset it should be noted that in both the Maryland and the New York state courts plea bargaining is permitted and a plea may be accepted despite a clear assertion of innocence.

Regardless of whether the plea in this case would have satisfied the requirements of Rule 11 of the Federal Rules of Criminal Procedure, had the criminal proceedings been pending in federal court, the state courts involved here clearly permitted the acceptance of a plea because "reasons other than the fact that he is guilty may induce a defendant to so plead," State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879), quoted in North Carolina v. Alford, 400 U.S. 25, 30 (1970).

In the Maryland proceedings, a plea bargain was made and the petitioner herein agreed to plead to a simple assault and on that basis the state agreed to drop all other charges. On presenting the plea, Mrs. O'Connor, the prosecuting attorney, was invited to state what it was she would present if the case had gone ahead to trial. She then recounted what various state witnesses would have testified on direct and the defendant (petitioner here) stipulated "that this is what the state's evidence will disclose on direct testimony." It is absolutely clear from the record that the stipulation went no farther than that and that there was no stipulation by the defendant as to the facts and no concession as to the truth or accuracy or the summary of proposed testimony.

Thereafter, counsel for the petitioner set forth what would have been presented on behalf of the defense. This presentation consisted of two portions: The first was a recitation of the testimony that would have been given by eight witnesses who would have established the defense of alibi. The second part of the defense was a statement

that Mr. Turco would personally take the stand and would testify as to his innocence.

It was at the point where defense counsel started moving into the second portion of this statement, namely, a reference to what Mr. Turco would personally have stated, that the prosecution raised an objection and it is an edited and thereby distorted portion of the ensuing colloquy that respondent Bar Association prints at the bottom of page 9 to the top of page 11 of its response.

The Bar Association omitted from its quotation the portion of the record which makes it absolutely clear that the only matter objected to by the prosecutor and the only matter withdrawn by the defense was a recitation of what Mr. Turco himself would testify to. This is shown by that portion of the transcript which immediately follows the quotation which appears in the Bar Association's response.

Directly after the statement by Mr. Kunstler, "I would agree to that," the record reads as follows:

> "(Proceedings at the bench were terminated.)
>
> THE COURT: Would the State please repeat its position made at the bench.
>
> MRS. O'CONNOR: The State would request that the portion of the transcript be deleted from the last witness stated by Mr. Kunstler,

> whom I believe was Mr. Clerk's [sic] testimony as Mr. Clark would give it, 2/ from there on out the State would request any testimony given by Mr. Turco, any reason asserted by Mr. Kunstler on behalf of Mr. Turco, be deleted from the record.
>
> MR. KUNSTLER: I have no objection.
>
> THE COURT: The record will disclose Mr. Turco individually is making no assertion concerning his own participation in the case. Is that correct?" (Transcript, Feb. 14, 1972, pp. 41-42.)

Reading the record in its entirety, it is unmistakeable that counsel was barred, apparently by the plea bargaining agreement, from stating what Mr. Turco's testimony would have been had he personally taken the witness stand but there was no objection to the inclusion within the record of all of the statements of the alibi witnesses, which of course directly contradicted the government witnesses' version of the facts.

Thus, when the Bar Association's response reads:

> "The Appellant [sic] Division relied on the summary of the prosecution's witnesses, to which petitioner had stipulated." (at p. 29; emphasis in original),

---

2/ Mrs. O'Connor was in error in assuming that Mr. Clark was the last witness. He was but the fifth of the eight alibi witnesses.

the Bar Association is absolutely right in so far as it states that the Appellate Division relied on the summary of the testimony of the prosecution's witnesses; that is precisely what petitioner complains about. But the concluding phrase that petitioner had stipulated to the summary of testimony as fact is an unvarnished misstatement of the record.

This fundamental effort to misstate the record is at the core of this case. By this time, the Bar Association seems almost to acknowledge that unless it can squeeze out of this record an admission of the facts, there was no Due Process before the state court. That is the reason why it has distorted the record in the hope of making it appear that there was an admission.

II.

THE RESPONDENT BAR ASSOCIATION AND THE APPELLATE DIVISION IN ITS OPINION COMPLETELY IGNORE THIS COURT'S HOLDING IN IN RE RUFFALO, 390 U.S. 544 (1968).

We have focused until now upon the Maryland proceedings. The situation in respect to the New York proceedings is really quite different. As to those proceedings, as we have already pointed out, even the Bar Association was "inclined" to accept the claim that there was an assertion of innocence. 3/ Since there was no independent

3/ Inspection of the record in the New York court renders this conclusion absolutely inescapable.

proof in the disciplinary proceedings of the substance of the New York charges (and they were sharply disputed by petitioner), there could be no basis for a factual conclusion as to what the New York charges established.

For this reason, the Bar Association shifts gears when it deals with the New York proceedings. At pp. 13-15 of its brief there is extensive discussion of the "stay in Canada" and this, of course, is mentioned by the Appellate Division as in part a basis for its decision (61a-62a).

The Bar Association admits that this item was "not the basis of the Bar Association's charges against the petitioner" (p. 15) but nevertheless should be considered.

That is in direct conflict with this Court's holding in In re Ruffalo, 390 U.S. 544 (1968), when it said:

> "These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33, 18 L. ed. 2d 527, 549, 87 S. Ct. 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> "How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of

Commissioners on Grievances and Discipline no one knows.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." (At 551-52.)

III.

RESPONDENT BAR ASSOCIATION ARGUES THAT THERE IS NO CONFLICT BETWEEN THE CIRCUITS, WHEN THE CIRCUIT JUDGES ARE QUITE CLEAR THAT THERE IS.

The Bar Association baldly states:

> "There is no conflict between the Second Circuit and the Sixth Circuit on the issue presented by this record." (p. 16)

But this is directly disputed by Getty v. Reed, 547 F. 2d 971, 975 (6th Cir., 1977), where the court points out that it is in disagreement with the decisions of the Second Circuit. It is also contradicted by the concurring opinion of Judge Oakes of the Second Circuit in this case wherein he states that he believes there is a direct conflict between the Sixth and Second Circuits (15a-16a).

Even the Attorney General's brief in this case seems to acknowledge that there is a conflict, although he argues that the differences "have been greatly exaggerated and in any event

have no application herein" (p. 6).

IV.

RESPONDENT APPELLATE DIVISION'S ARGUMENT THAT "THE MERITS OF THE PETITIONER'S CONTENTIONS" HAVE BEEN REVIEWED FIVE TIMES AND THEREFORE DO NOT WARRANT FURTHER REVIEW BY THIS COURT IS NOT IN ACCORD WITH THE RECORD.

At pages 8 and 9 of the Appellate Division brief the argument is made that the merits of the petitioner's arguments have been reviewed and found wanting many times and that therefore this Court should not review the matter.

Of course, the whole point of the U.S. District Court decision and the Circuit Court decision was that they would not for jurisdictional reasons consider the case. Indeed, the Circuit Court indicated that it might, if it were reviewing the case, see some merit in some of the petitioner's contentions.

It is precisely because the petitioner has been prevented by jurisdictional obstacles from having a review of his case on the merits that he has limited the question presented to this Court to a review of the jurisdictional issue.

V.

RESPONDENTS ARE ARGUING FOR A COMPLETE NULLIFICATION OF THE ROLE OF THE FEDERAL COURTS IN THE SYSTEM OF ENFORCEMENT OF CONSTITUTIONAL RIGHTS WHENEVER A STATE COURT HAS DECIDED A CASE -- EVEN WHEN THE ISSUE INVOLVES THE CONSTITUTIONALITY OF THE PROCEDURES OF THE STATE COURT.

The reliance of the Bar Association on the case of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), frankly seeks to turn the clock back to the period before this Court recognized the independent role of the federal courts under the Civil Rights Act to guarantee Constitutional rights. Rooker was decided almost half a century before that development; the opinion does not even mention the Civil Rights Act.

The position of the respondents in this case is that the doors of the federal courts should be closed whenever a state court has dealt with a matter, even if the thrust of the claim of the denial of Constitutional rights is the procedure before the state court. To carve out such an exception to the responsibility of federal courts to protect Constitutional rights means that, excepting for the processes of this Court by certiorari, there is no remedy for these denials of Constitutional rights. Such a position is inconsistent with the clear rulings of this Court. It certainly cannot be squared with the holding or the following comment in Mitchum v. Foster, 407 U.S. 225, 240 (1972):

> "It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, ... whether that action be executive, legislative, or judicial.' (Emphasis by this Court.)

And the argument that certiorari to this Court is an adequate protection against state court denial of Constitutional rights can hardly be squared with this Court's statement in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416, that:

> "[E]ven when available by appeal rather than only by discretionary writ of certiorari, [that possibility] is an inadequate substitute for the initial District Court determination ... to which the litigant is entitled in the federal courts."

In any event, Rooker and more recent cases which seek to apply a res judicata doctrine to civil rights actions are clearly distinguishable from this case in that here the Constitutional issue focuses upon the procedures of the very tribunal whose determination is claimed to be immune from scrutiny. Rooker, by contrast, involved a Constitutional determination by a state court having nothing to do with its own procedures. The same generally holds true for the other cases. It is this feature which on principle must serve to prevent the doctrine of res judicata from giving absolute finality to the state court's determination. Aside from the

fact that the possibility of review by certiorari before this Court is not an adequate remedy in any case (England, supra), it is particularly inadequate where the issue is the adequacy of the procedures below. In such a situation, if the matter is taken to this Court directly from the state court (as attempted here), this Court will not have the benefit of an unbiased opinion of the validity of the procedures below (as occurred here). Such an opinion could only be rendered by an independent tribunal -- the United States District Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, N. Y. 10003
(212) 674-3304

Attorneys for Petitioner

Dated: New York, N. Y.
August 30, 1977.